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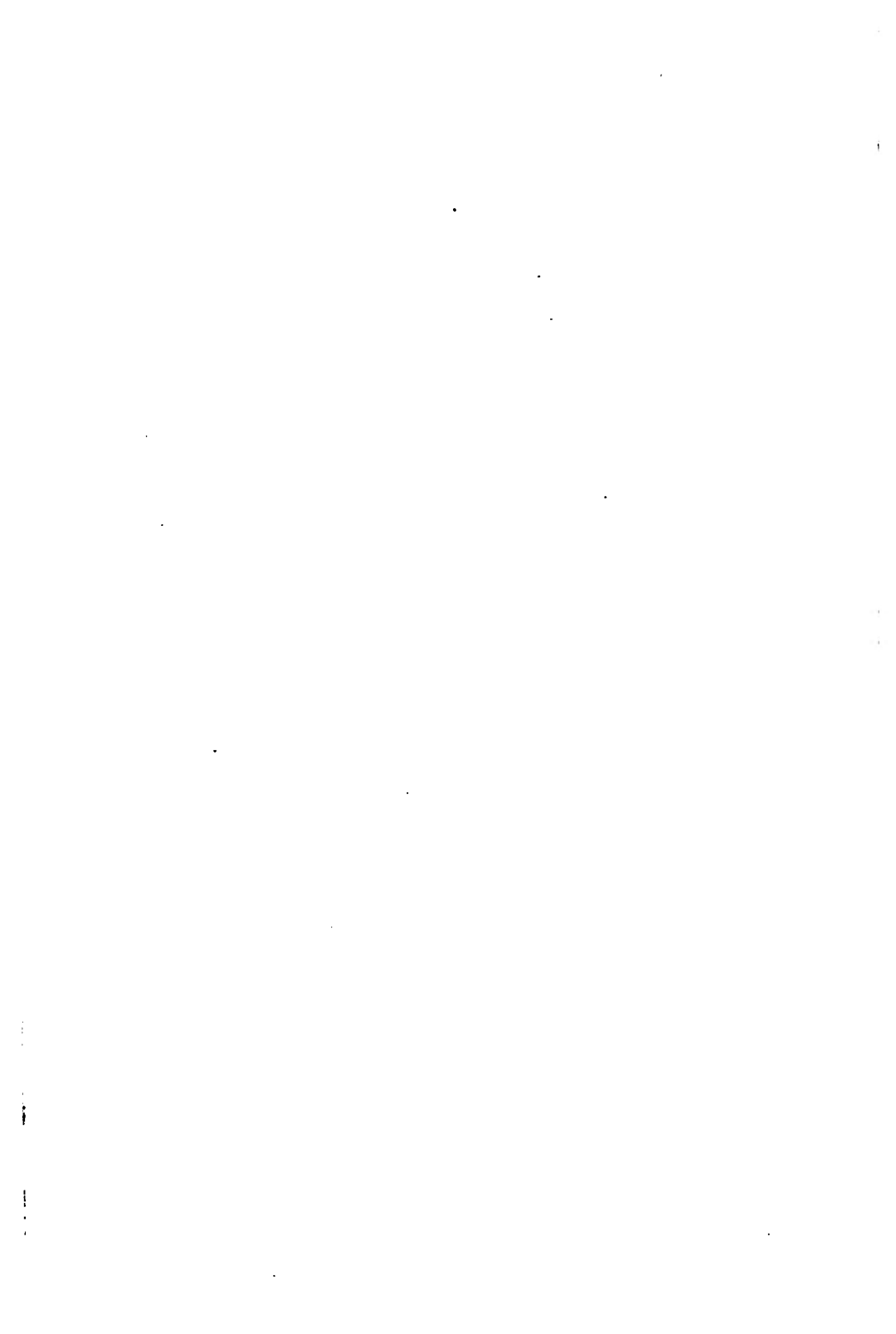
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# INTERNATIONAL LAW

## A TREATISE

BY

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VOL. II.

WAR AND NEUTRALITY

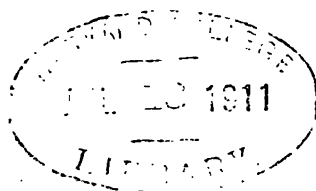
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# **PREFACE**

**TO**

## **THE SECOND VOLUME**

IN placing before the public this concluding portion of my treatise I would refer my readers to the preface to the first volume for an account of its general scope and method. The present volume bears the title "War and Neutrality," although Parts II. and III. alone treat of these subjects, whereas Part I. is devoted to Settlement of State Differences. It would perhaps have seemed more consistent to deal with this last topic in Volume I. ; for a condition of peace must be considered as existing even at a time when use is being made of the machinery for the compulsory settlement of differences. But it is, at any rate, not unusual to treat this topic in an introductory chapter in the discussion of War and Neutrality.

The reader will find that notice is taken of all incidents of legal interest which occurred during the recent Chino-Japanese, South African, and Russo-Japanese Wars. If he belong to the rather numerous class of those who assert that there is no stability in the rules of International Law, which are altering every day and, in an especial measure, during the

course of each successive war, I am afraid that he may be disappointed; for he will find that in this volume an endeavour is made to master the problems raised by these recent wars by the aid of the rules recognised of old. There are, of course, some problems, such, for instance, as the question of floating mines, which call for new rules. And there can be no doubt that, as every war makes history, so it makes law also, as it settles many rules which previously were doubtful. Thus, for example, I believe that the South African War, which gave rise to the incident of the "Bundesrath," has settled the rule, formerly doubtful, that vessels, although running between neutral ports, can nevertheless be considered to be carrying contraband. And, similarly, I hold that the attitude of the neutral Powers towards the Russian men-of-war, which, during the Russo-Japanese War, asked for asylum in neutral ports, has established the rule that belligerent men-of-war must be dismantled and detained, with their crews, until the conclusion of peace if they require more than merely temporary asylum.

Those who compare this volume with other treatises will, I think, find many new topics here discussed which have hitherto been nowhere treated. For instance, no book has furnished previously a detailed account of the means to be adopted for securing legitimate warfare, and, more especially, of the punishment of war crimes. The arrangement, moreover, of the subjects in Parts II. and III. differs throughout from that of other treatises. This departure from the

usual grouping has not been prompted by desire for novelty : it has been dictated by that need of lucidity which is the prime consideration in a book by a teacher designed for the use of students.

I have tried to write this volume in a truly international spirit, neither taking any one nation's part nor denouncing any other. It is to be deplored that many writers on the law of war and neutrality should take every opportunity of displaying their political sympathies and antipathies, and should confound their own ideas of justice, humanity, and morality with the universally recognised rules of warfare and neutrality. French books often contain denunciation of the Germans and the English ; English books—Hall's classical treatise furnishes at once an illustration and a warning—frequently condemn the Germans and the Russians ; and the Germans on many occasions retaliate by reproaching the French and the English. It ought surely to be possible to discuss these matters in an impartial spirit. And although it may not be necessary for an author to conceal his opinion on some indefensible act or conduct of some particular nation, he should never forget that *Iliacos intra muros peccatur et extra*, and that his own nation cannot fail to have made many a slip from the narrow path of strict righteousness.

I venture to hope that the Appendix will prove useful to every student. The nine law-making Treaties appended are printed in their French texts, because these are authoritative, and the official English translations published in the Treaty Series



are sometimes inaccurate. I have also appended the Foreign Enlistment Act, 1870, the Naval Prize Act, 1864, and the Naval Prize Courts Act, 1894; they will, I think, be serviceable equally to English and to foreign students.

An arrangement has been made by which the printers have had this present volume indexed in such a way as to facilitate reference to the first volume also. My grateful thanks are again due to Mr. Addis and to Mr. Bucknill for their valuable assistance.

L. OPPENHEIM.

THE LONDON SCHOOL OF ECONOMICS AND  
POLITICAL SCIENCE (UNIVERSITY OF LONDON),  
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# ABBREVIATIONS

## OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

THE books referred to are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are very often referred to throughout this work are quoted in an abbreviated form, as follows :—

Annuaire	=	Annuaire de l'Institut de Droit International
Bluntschli	=	Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878).
Boeck	=	Boeck, De La Propriété Privée Ennemie Sous Pavillon Ennemi (1882).
Bonfilis	=	Bonfilis, Manuel De Droit International Public, 4th ed. by Fauchille (1904).
Bulmerincq	=	Bulmerincq, Das Völkerrecht (1887).
Calvo	=	Calvo, Le Droit International, etc., 5th ed., 6 vols. (1896).
Despagnet	=	Despagnet, Cours De Droit International Public, 2nd ed. (1899).
Dupuis	=	Dupuis, Le Droit De La Guerre Maritime D'après Les Doctrines Anglaises Contemporaines (1899).
Field	=	Field, Outlines of an International Code, 2 vols. (1872-1873).
Fiore	=	Fiore, Nouveau Droit International Public, deuxième édition, traduite de l'Italien et annotée par Antoine, 3 vols. (1885).
Gareis	=	Gareis, Institutionen des Völkerrechts, 2nd ed. (1901).
Gessner	=	Gessner, Le Droit Des Neutres Sur Mer (1865).
Grotius	=	Grotius, De Jure Belli ac Pacis (1625).

**x ABBREVIATIONS OF TITLES OF BOOKS, ETC.,**

Hague Regulations	=	Hague Regulations respecting the Laws and Customs of War on Land, adopted by the Hague Peace Conference of 1899.
Hall	=	Hall, A Treatise on International Law 4th ed. (1895).
Halleck	=	Halleck, International Law, 3rd English ed. by Sir Sherston Baker, 2 vols. (1893).
Hartmann	=	Hartmann, Institutionen des praktischen Völkerrechts in Friedenszeiten (1874).
Hautefeuille	=	Hautefeuille, Des Droits Et Des Devoirs Des Nations Neutres En Temps De Guerre Maritime, 3 vols. (2nd ed. 1858).
Heffter	=	Heffter, Das Europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).
Heilborn, Rechte	=	Heilborn, Rechte und Pflichten der Neutralen Staaten in Bezug auf die während des Krieges auf ihr Gebiet übertretenden Angehörigen einer Armee und das dorthin gebrachte Kriegsmaterial der Kriegführenden Partheien (1888).
Heilborn, System	=	Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).
Holland, Prize Law	=	Holland, A Manual of Naval Prize Law (1888).
Holland, Studies	=	Holland, Studies in International Law (1898).
Holland, Jurisprudence	=	Holland, The Elements of Jurisprudence, 6th ed. (1893).
Holland, War	=	Holland, The Laws and Customs of War on Land, as defined by the Hague Convention of 1899 (1904).
Holtzendorff	=	Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885-1889).
Kleen	=	Lois et Usages De La Neutralité, 2 vols. (1900).
Klüber	=	Klüber, Europäisches Völkerrecht, 2nd ed. by Morstadt (1851).
Kriegsgebrauch	=	Kriegsgebrauch im Landkriege (1902). (Heft 31 der kriegsgeschichtlichen Einzelschriften, herausgegeben vom Grossen Generalstabe, Kriegsgeschichtliche Abtheilung I.)

Lawrence	=	Lawrence, The Principles of International Law, 3rd ed. (1900).
Lawrence, Essays	=	Lawrence, Essays on some Disputed Questions of Modern International Law, 2nd ed. (1885).
Lawrence, War	=	Lawrence, War and Neutrality in the Far East, 2nd ed. (1904).
Liszt	=	Liszt, Das Völkerrecht, 3rd ed. (1904).
Longuet	=	Longuet, Le Droit Actuel De La Guerre Terrestre (1901).
Lorimer	=	Lorimer, The Institutes of International Law, 2 vols. (1883-1884).
Maine	=	Maine, International Law, 2nd ed. (1894).
Manning	=	Manning, Commentaries on the Law of Nations, new ed. by Sheldon Amos (1875).
Martens	=	Martens, Völkerrecht, German translation of the Russian original in 2 vols. (1883).
Martens, G. F.	=	G. F. Martens, Précis Du Droit Des Gens Moderne De l'Europe, nouvelle éd. by Vergé, 2 vols. (1858).
Martens, R.	}	These are the abbreviated quotations of the different parts of Martens, Recueil de Traités (see p. 94 of vol. I.), which are in common use.
Martens, N. R.		
Martens, N. S.		
Martens, N. R. G.		
Martens, N. R. G., 2nd ser.		
Martens, Causes Célèbres	=	Martens, Causes Célèbres du Droit des Gens, 5 vols., 2nd ed. (1858-1861).
Mérignhac	=	Mérignhac, Les Lois Et Coutumes De La Guerre Sur Terre (1903).
Nys	=	Nys, Le Droit International, vol. i. (1904).
Ortolan	=	Ortolan, Règles Internationales et Diplomatie de la Mer, 2 vols., 3rd ed. (1856).
Perels	=	Perels, Das Internationale öffentliche Seerecht der Gegenwart, 2nd ed. (1903).
Phillimore	=	Phillimore, Commentaries upon International Law, 4 vols. 3rd ed. (1879-1888).
Piedelièvre	=	Piedelièvre, Précis De Droit International Public, 2 vols. (1894-1895).
Pillet	=	Pillet, Les Lois Actuelles De La Guerre (1901).



## xii ABBREVIATIONS OF TITLES OF BOOKS, ETC.

Pradier-Fodéré=	Pradier-Fodéré, <i>Traité De Droit International Public</i> , 7 vols. (1885-1897).
Pufendorf =	Pufendorf, <i>De Jure Naturæ et Gentium</i> (1672).
R.G. =	<i>Revue Générale De Droit International Public</i> .
R.I. =	<i>Revue De Droit International Et De Législation Comparée</i> .
Rivier =	Rivier, <i>Principes Du Droit Des Gens</i> , 2 vols. (1896).
Taylor =	Taylor, <i>A Treatise on International Public Law</i> (1901).
Testa =	Testa, <i>Le Droit Public International Maritime</i> , traduction du Portugais par Bontiron (1886).
Twiss =	Twiss, <i>The Law of Nations</i> , 2 vols., 2nd ed. (1884, 1875).
Ullmann =	Ullmann, <i>Völkerrecht</i> , 1898.
U.S. Naval War Code =	<i>The Laws and Usages of War at Sea</i> , published on June 27, 1900, by the Navy Department, Washington, for the use of the U.S. Navy and for the information of all concerned.
Vattel =	Vattel, <i>Le Droit Des Gens</i> , 4 books in 2 vols., nouvelle éd. (Neuchâtel, 1773).
Walker =	Walker, <i>A Manual of Public International Law</i> (1895).
Walker, History =	Walker, <i>A History of the Law of Nations</i> , vol. i. (1899).
Walker, Science =	Walker, <i>The Science of International Law</i> (1893).
Westlake =	Westlake, <i>International Law</i> , vol. i. (1904).
Westlake, Chapters =	Westlake, <i>Chapters on the Principles of International Law</i> (1894).
Wharton =	Wharton, <i>A Digest of the International Law of the United States</i> , 3 vols. (1886).
Wheaton =	Wheaton, <i>Elements of International Law</i> , 8th American ed. by Dana (1866).

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**PART I**  
**SETTLEMENT OF STATE DIFFERENCES**





## CHAPTER I

### AMICABLE SETTLEMENT OF STATE DIFFERENCES

#### I

#### STATE DIFFERENCES AND THEIR AMICABLE SETTLEMENT IN GENERAL

Twiss, II. §§ 1-3—Ullmann, § 131—Bulmerincq in Holtzendorff, IV. pp. 5-12—Heffter, §§ 105-107—Rivier, II. § 57—Bonfils, No. 930—Pradier-Fodéré, IV. Nos. 2580-2583—Calvo, III. §§ 1670-1671—Martens, II. §§ 101-102—Fiore, II. Nos. 1192-1198—Wagner, "Zur Lehre von den Streiterledigungsmitteln des Völkerrechts" (1900).

§ 1. International differences may arise from a variety of grounds. Between the extreme causes of a simple and comparatively unimportant act of discourtesy committed by one State against another, on the one hand, and, on the other, of so gross an insult as must necessarily lead to war, there are many other grounds varying in nature and importance. State differences are correctly divided into legal and political. Legal differences arise from acts for which States have to bear responsibility, be it acts of their own or of their Parliaments, judicial and administrative officials, armed forces, or individuals living on their territory.<sup>1</sup> Political differences are the result of a conflict of political interests. But although this distinction is certainly theoretically correct and of practical importance, in practice a sharp line can frequently not be drawn. For in

Legal and  
political  
Inter-  
national  
Differ-  
ences

<sup>1</sup> See above, Vol. I. § 149.

#### 4 AMICABLE SETTLEMENT OF STATE DIFFERENCES

many cases States either hide their political interests behind a claim for an alleged injury, or they make a positive, but comparatively insignificant, injury a pretext for the carrying out of political ends. Nations which have been for years facing each other armed to the teeth, waiting for a convenient moment to engage in hostilities, are only too ready to obliterate the boundary line between legal and political differences. Between such nations a condition of continuous friction prevails which makes it difficult, if not impossible, in every case which arises to distinguish the legal from the political character of the difference.

Inter-  
national  
Law not  
exclu-  
sively  
concerned  
with  
Legal Dif-  
ferences.

§ 2. It is often maintained that the Law of Nations is concerned with legal differences only, political differences being a matter not of law but of politics. Now it is certainly true that only legal differences can be settled through a juristic decision of the underlying juristic question, whatever may be the way in which such decision is arrived at. But although political differences cannot be the object of a juristic decision, they may be settled short of war by some amicable or compulsive means. And legal differences, although within the scope of a juristic decision, may be of such kinds as to prevent the parties from submitting them to such decision, without being thereby of such a nature that they cannot be settled peaceably at all. Moreover, although the distinction between legal and political differences is certainly correct in theory and of importance in practice, nevertheless in practice a sharp line frequently cannot be drawn, as has just been pointed out. Therefore the Law of Nations is not exclusively concerned with legal differences, for in fact all amicable means of settling legal differences

are at the same time means of settling political differences, and so are two of the compulsive means of settling differences—namely, pacific blockade and intervention.

§ 3. Political and legal differences may be settled either by amicable or by compulsive means. There are four kinds of amicable means—namely, negotiation between the parties, good offices of third parties, mediation, and arbitration.<sup>1</sup> And there are also four kinds of compulsive means—namely, retorsion, reprisals (including embargo), blockade, and intervention of third States. No State is allowed to make use of compulsive means before the amicable means of negotiation has been tried, but there is no necessity for the good offices or mediation of third States, and eventually arbitration, to be tried beforehand also. Frequently, however, States nowadays make use of the so-called Compromise Clause<sup>2</sup> in their treaties, stipulating thereby that any differences arising between the contracting parties with regard to matters regulated by, or to the interpretation of, the respective treaties shall be settled through the amicable means of arbitration to the exclusion of all compulsive means. And there are even a few examples of States which have concluded treaties stipulating that all differences, without exception, that might arise between them should be amicably settled by arbitration.<sup>3</sup> These exceptions, however,

Amicable in contra-distinction to compulsive settlement of Differences.

<sup>1</sup> Some writers (see Hall, § 118, and Heilborn, System, p. 404) refuse to treat negotiation, good offices, and mediation as means of settling differences, because they cannot find that these means are of any legal value, it being in the choice of the parties whether or not they agree to make use of them. They forget, however, the enormous political value

of these means, which alone well justifies their treatment; moreover, there are already some positive legal rules in existence concerning these means—see Hague Arbitration Treaty, articles 2-7 and 9-14—and others will in time, no doubt, be established.

<sup>2</sup> See above, Vol. I. § 553.

<sup>3</sup> See below, § 17.

## 6 AMICABLE SETTLEMENT OF STATE DIFFERENCES

only confirm the rule that no international legal duty exists for States to settle their differences amicably through arbitration, or even to try to settle them in this way, before they make use of compulsive means.

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### II

#### NEGOTIATION

Twiss, II. § 4—Taylor, §§ 359-360—Heffter, § 107—Bulmerincq in Holtzendorff, IV. pp. 13-17—Ullmann, § 132—Bonfil, Nos. 931-932—Pradier-Fodéré, VI. Nos. 2584-2587—Rivier, II. § 57—Calvo, III. §§ 1672-1680—Martens, II. § 103.

In what  
Negotia-  
tion con-  
sists.

§ 4. The simplest means of settling State differences, and that to which States resort regularly before they make use of other means, is negotiation. It consists in such acts of intercourse between the parties as are initiated and directed for the purpose of effecting an understanding and thereby amicably settling the difference that has arisen between them.<sup>1</sup> Negotiation as a rule begins by a State complaining of a certain act, or lodging a certain claim with another State. The next step is a statement from the latter making out its case, which is handed over to the former. It may be that the parties come at once to an understanding through this simple exchange of statements. If not, other acts may follow according to the requirements of the special case. Thus, for instance, other statements may be exchanged, or a conference of diplomatic envoys, or even of the heads of the States at variance, may be arranged for the purpose of discussing the differences and preparing the basis for an understanding.

<sup>1</sup> See above, Vol. I. §§ 477-482, where the international transaction of negotiation in general is discussed.

§ 5. The signatory Powers of the Hague Convention for the peaceful settlement of international differences (articles 9-14) recommend that, if the ordinary diplomatic negotiation has failed to settle differences, the parties shall institute an International Commission of Inquiry<sup>1</sup> for the purpose of elucidating the facts underlying the difference by an impartial and conscientious investigation. The rules laid down by the Convention for such commissions are the following:—

International  
Commission  
of Inquiry.

The Commission is to be constituted by a special treaty between the conflicting parties, and such treaty is to specify the facts that are to be examined, the extent of the powers of the commissioners, and the procedure to be followed. Both sides must be heard at the inquiry. The forms and periods of procedure have to be specified by the Commission itself, in case they are not stipulated by the treaty arranging an inquiry. The formation of the Commission, if not otherwise stipulated, takes place by each party appointing two Commissioners, who together choose an umpire. After having elucidated the facts, the Commission makes a Report and communicates it, signed by all the members of the Commission, to the conflicting Powers. This report is absolutely limited to a statement of the facts, it has in no way the character of an arbitral award, and it leaves the conflicting parties entire freedom as to the effect to be given to such statement.<sup>2</sup>

<sup>1</sup> See Holla, *The Peace Conference at the Hague* (1900), pp. 203-320.

<sup>2</sup> The first occasion when an International Commission of Inquiry was instituted arose in 1904. On October 24 of that year, during the Russo-Japanese war, the Russian Baltic fleet, which was

on its way to the Far East, fired into the Hull fishing fleet off the Dogger Bank, in the North Sea, whereby two fishermen were killed and considerable damage was done to several trawlers. Great Britain demanded from Russia not only an apology and ample damages, but also severe punishment of the

## 8 AMICABLE SETTLEMENT OF STATE DIFFERENCES

Effect of  
Negotia-  
tion.

§ 6. The effect of negotiation may be to make it apparent that the parties cannot come to an amicable understanding at all. But frequently the effect is that one of the parties acknowledges the claim of the other party. Again, sometimes negotiation results in a party, although it does not acknowledge the opponent's alleged rights, waiving its own rights for the sake of peace and for the purpose of making friends with the opponent. And, lastly, the effect of negotiation may be a compromise between the parties. Frequently the parties, after having come to an understanding, conclude a treaty by which they embody the terms of the understanding arrived at through negotiation. The practice of everyday life shows clearly the great importance of negotiation as a means of settling international differences. The modern development of international traffic and transport, the fact that individuals are constantly travelling on foreign territories, the keen interest taken by all powerful States in colonial enterprise,

officer responsible for the outrage. As Russia maintained that the firing of the fleet was caused by the approach of some Japanese torpedo-boats, and that she could therefore not punish the officer in command, the parties agreed upon the establishment of an International Commission of Inquiry, which, however, was charged not only to ascertain the facts of the incident but also to pronounce an opinion concerning the responsibility for the incident and the degree of blame attaching to the responsible persons. The Commission consisted of five naval officers of high rank—namely, one British, one Russian, one American, one French, and one Austrian, who sat at Paris in February 1905. The report of the

Commission states that no torpedo-boats had been present, that the opening of fire on the part of the Baltic fleet was not justifiable, that Admiral Rojdestvensky, the commander of the Baltic fleet, was responsible for the incident, but that these facts were "not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky or of the *personnel* of his squadron." In consequence of the last part of this report Great Britain could not insist upon any punishment to be meted out to the responsible Russian Admiral, but Russia paid a sum of 65,000*l.* to indemnify the victims of the incident and the families of the two dead fishermen.

and many other factors, make the daily rise of differences between States unavoidable. Yet the greater number of such differences are always settled through negotiation of some kind or other.

### III

#### GOOD OFFICES AND MEDIATION

Maine, pp. 207-228—Phillimore, III. §§ 3-5—Twiss, II. § 7—Taylor, §§ 359-360—Wheaton, § 73—Bluntschli, §§ 483-487—Heffter, §§ 107-108—Bulmerincq in Holtzendorff, IV. pp. 17-30—Ullmann, § 133—Bonfilis, Nos. 933-943—Despagnet, Nos. 480-483—Pradier-Fodéré, VI. Nos. 2588-2593—Rivier, II. § 58—Calvo, III. §§ 1682-1705—Fiore, III. Nos. 1199-1201—Martens, II. § 103—Holla, "The Peace Conference at the Hague" (1900), pp. 176-203.

§ 7. When parties are not inclined to settle their differences by negotiation, or when they have negotiated without effecting an understanding, a third State may procure a settlement through its good offices or its mediation, whether only one or both parties have asked for the help of the third State or the latter has spontaneously offered it. There is also possible a collective mediation, several States acting at the same time as mediators. It is further possible for a mediatorial Conference or Congress to meet for the purpose of discussing the terms of an understanding between the conflicting parties. And it must be especially mentioned that good offices and mediation are not confined to the time before the differing parties have appealed to arms; they may also be offered and sought during hostilities for the purpose of bringing the war to an end. It is during war in particular that good offices and mediation are of great value, neither of the belligerents as a rule

Occasions  
for Good  
Offices and  
Media-  
tion.



being inclined to open peace negotiations on his own account.

Right and  
duty of  
offering,  
request-  
ing, and  
rendering  
Good  
Offices and  
Media-  
tion.

§ 8. As a rule, no duty exists for a third State to offer its good offices or mediation, or to respond to a request of the conflicting States for such, nor is it, as a rule, the duty of the conflicting parties themselves to ask or to accept a third State's good offices and mediation. But by special treaty such duty may be stipulated. Thus, for instance, by article 8 of the Peace Treaty of Paris of March 30, 1856, between Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey, it was stipulated that, in case in the future such difference as threatened peace should arise between Turkey and one or more of the signatory Powers, the parties should be obliged, before resorting to arms, to ask for mediation of the other signatory Powers. Thus, further, article 12 of the General Act of the Berlin Congo Conference of 1885 stipulates that, in case a serious difference should arise between some of the signatory Powers as regards the Congo territories, the parties should, before resorting to arms, be obliged to ask the other signatory Powers for their mediation. And lately the Hague Convention for the peaceful settlement of international differences laid down some stipulations respecting the right and duty of good offices and mediation, which will be found below in § 10.

Good  
Offices in  
contradis-  
tinction  
to Media-  
tion.

§ 9. Diplomatic practice frequently does not distinguish between good offices and mediation. But although good offices may easily develop into mediation, they must not be confounded with it. The difference between them is that, whereas good offices consist in various kinds of actions tending to call negotiations between the conflicting States into existence, mediation consists in a direct conduct of

negotiations between the differing parties on the basis of proposals made by the mediator. Good offices seek to induce the conflicting parties, who are either not at all inclined to negotiate with each other or who have negotiated without effecting an understanding, to enter or to re-enter into such negotiations. Good offices may also consist in advice, in submitting a proposal of one of the parties to the other, and the like, but they never interfere in the negotiations themselves. On the other hand, the mediator is the middleman who takes part in the negotiations. He makes certain propositions on the basis of which the States at variance may come to an understanding. He even conducts the negotiations himself, always anxious to reconcile the opposing claims and to appease the feeling of resentment between the parties. All the efforts of the mediator may often, of course, be useless, the differing parties being unable or unwilling to consent to an agreement. But if an understanding is arrived at, the position of the mediator as a party to the negotiation, although not a participator in the difference, frequently becomes clearly apparent either by the drafting of a special act of mediation which is signed by the States at variance and the mediator, or by the fact that in the convention between the conflicting States, which stipulates the terms of their understanding, the mediator is mentioned.

§ 10. The Hague Convention of 1899 for the peaceful settlement of international differences undertakes in its articles 2-7 the task of making the signatory Powers have recourse more frequently than hitherto to good offices and mediation, and of creating a new and particular form of mediation. Its rules are the following :—

Good  
Offices and  
Mediation  
according  
to the  
Hague Ar-  
bitration  
Conven-  
tion.

(1) The signatory Powers agree to have recourse, before they appeal to arms, as far as circumstances allow, to good offices or mediation (article 2). And independently of this recourse, they consider it useful that signatory Powers who are strangers to the dispute should, on their own initiative, offer their good offices or mediation (article 3). A real legal duty to offer good offices or mediation is not thereby created; the usefulness of such offer only is recognised. In regard to the legal duty of conflicting States to ask for good offices or mediation, it is obvious that, although literally such duty is agreed upon, the condition "as far as circumstances allow" makes it more or less illusory, as it is in the discretion of the parties to judge for themselves whether or not the circumstances of the special case allow their having recourse to good offices and mediation.

(2) The signatory Powers agree that (article 3) a right to offer good offices or mediation exists for those of them who are strangers to a dispute, and that this right exists also after the conflicting parties have appealed to arms. Consequently, every signatory Power, when at variance with another, be it before or after the outbreak of hostilities, is in duty bound to receive an offer made for good offices or mediation, although it need not accept such offer. And it is especially stipulated that the exercise of the right to offer good offices or mediation can never be regarded by the conflicting States as an unfriendly act (article 3). It is, further, stipulated (article 27) that the signatory Powers consider it their duty to remind the parties in a serious conflict of the permanent Court of Arbitration, and that the advice to have recourse to this Court can only be considered as an exercise of good offices.

(3) Mediation is defined (article 4) as reconciliation of the opposing claims and appeasement of the feelings of resentment between the conflicting States, and it is specially emphasised that good offices and mediation have exclusively the character of advice.

(4) The acceptance of mediation—and, of course, of good offices, which is not mentioned—does not (article 7), have the effect of interrupting, delaying, or hindering mobilisation or other preparatory measures for war, or of interrupting military operations when war has broken out before the acceptance of mediation, unless there should be an agreement to the contrary.

(5) The functions of the mediator are at an end (article 5) when once it is stated, either by one of the conflicting parties or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

(6) A new and particular form of mediation is recommended by article 8. Before appealing to arms the conflicting States choose respectively a State as umpire, to whom each intrusts the mission of entering into direct communication with the umpire chosen by the other side for the purpose of preventing the rupture of pacific relations. The period of the mandate extends, unless otherwise stipulated, to thirty days, and during such period the conflicting States cease from all direct communication on the matter in dispute, which is regarded as referred exclusively to the mediating umpires, who must use their best efforts to settle the difference. Should such mediation not succeed in bringing the conflicting States to an understanding, and should consequently a definite rupture of pacific relations take place, the chosen umpires are charged with the joint task of

taking advantage of any opportunity to restore peace.

Value  
of Good  
Offices  
and Medi-  
ation.

§ 11. The value of good offices and mediation for the amicable settlement of international conflicts, be it before or after the parties have appealed to arms, cannot be over-estimated. Hostilities have been frequently prevented through the authority and the skill of mediators, and furiously raging wars have been brought to an end through good offices and mediation of third States.<sup>1</sup> Nowadays the importance of these means of settlement of international differences is even greater than in the past. The outbreak of war is under the circumstances and conditions of our times no longer a matter of indifference to all except the belligerent States, and no State which goes to war knows exactly how far such war may affect its very existence. If good offices and mediation interpose at the right moment, they will in many cases not fail to effect a settlement of the conflict. The stipulations of the Hague Convention for the peaceful adjustment of differences have greatly enhanced the value of good offices and mediation by giving a legal right to Powers, strangers to the dispute, to offer their good offices and mediation before and during hostilities.

<sup>1</sup> See the important cases of mediation discussed by Calvo, III. §§ 1684-1700, and Bonfils, Nos. 936-942. From our own days the case of the Dogger Bank incident of 1904 may be quoted as an example, for it was through the mediation of France that Great Britain and Russia agreed upon the establishment of an Inter-

national Commission of Inquiry. (See p. 7, note 2.) And the good offices of the President of the United States of America induced Russia and Japan, in August 1905, to open the negotiations which actually led to the conclusion of the Peace of Portsmouth on September 5, 1905.

## IV

## ARBITRATION

Grotius, II. c. 23, § 8—Vattel, II. § 329—Hall, § 119—Westlake, I. pp. 332-356—Lawrence, §§ 241-242—Phillimore, III. §§ 3-5—Twiss, II. § 5—Taylor, §§ 357-358—Wharton, III. § 316—Bluntschli, §§ 488-498—Heffter, § 109—Bulmerincq in Holtzendorff, IV. pp. 30-58—Ullmann, § 134—Bonfil, Nos. 944-969—Despagnet, Nos. 699-713—Pradier-Fodéré, VI. Nos. 2602-2630—Rivier, II. § 59—Calvo, III. §§ 1706-1806—Fiore, II. Nos. 1202-1215—Martens, II. § 104—Bouard de Card, "L'arbitrage international" (1876)—Mérignhac, "Traité théorique et pratique de l'arbitrage" (1895)—Moore, "History and Digest of the Arbitrations to which the United States has been a Party," 6 vols. (1898)—Darby, "International Arbitration," 4th ed. (1904)—Dumas, "Les sanctions de l'arbitrage international" (1905)—Lapradelle et Politis, "Recueil des arbitrages internationaux," I. (1798-1855), (1905).

§ 12. Arbitration is the name for the determination of differences between States through the verdict of one or more umpires chosen by the parties. As there is no central political authority above, and no such International Court as could exercise jurisdiction over, the Sovereign States, State differences, unlike differences between private individuals, cannot as a rule be obligatorily settled in courts of justice. The only way in which a settlement of State differences through a verdict may be arrived at is that the conflicting States voluntarily consent to submit themselves to a verdict of one or more umpires chosen by themselves for that purpose.

Concep-  
tion of Ar-  
bitration.

§ 13. It is, therefore, necessary for such conflict-  
ing States as intend to have the conflict determined by arbitration to conclude a treaty by which they agree to this course. Such treaty of arbitration involves the obligation of both parties to submit in good faith to the decision of the arbitrators. Frequently a treaty of arbitration will be concluded

Treaty of  
Arbitra-  
tion.

after the outbreak of a difference, but it also frequently happens that States concluding certain treaties stipulate therein at once, by the so-called Compromise Clause,<sup>1</sup> that any difference arising between the parties respecting matters regulated by such treaty shall be determined by arbitration. Two or more States can also conclude a so-called general treaty of arbitration, or treaty of permanent arbitration, stipulating that all or certain kinds of differences in future arising between them shall be settled by this method. Thus article 7 of the Commercial Treaty between Holland and Portugal<sup>2</sup> of July 5, 1894, contains such a general treaty of arbitration, as it stipulates arbitration not only for differences respecting matters of commerce, but for all kinds of differences arising in the future between the parties, provided these differences do not concern their independence or autonomy. Before the Hague Peace Conference of 1899, however, general treaties of arbitration were not numerous. But public opinion everywhere was aroused in favour of general arbitration treaties through the success of this conference, with the result that from 1900 to the present day many general arbitration treaties have been concluded.<sup>3</sup>

Who is to  
arbitrate ?

§ 14. States which conclude an arbitration treaty have to agree upon the arbitrators. If they choose a third State as arbitrator, they have to conclude a treaty (*receptum arbitri*) with such State, by which they appoint the chosen State and by which such State accepts the appointment. The appointed State chooses on its own behalf those umpires who actually serve as arbitrators. It may happen that the conflicting States choose a head of a third State as

<sup>1</sup> See above, § 3.

XXII. p. 590.

<sup>2</sup> See Martens, N.R.G., 2nd ser.

<sup>3</sup> See below, § 17.

arbitrator. But such head never himself investigates the matter ; he chooses one or more individuals, who make a report and propose a verdict, which he pronounces. And, further, the conflicting States may agree to entrust the arbitration to any other individual or to a body of individuals, a so-called Arbitration Committee or Commission. Thus the arbitration of 1900 in regard to the Venezuelan Boundary Dispute between Great Britain, Venezuela, and the United States was conducted by a Commission, sitting at Paris, consisting of American and English members and the Russian Professor van Martens as President. And the Alaska Boundary Dispute between Great Britain and the United States was settled in 1903 through the award of a Commission, sitting at London, consisting of American and Canadian members, with Lord Alverstone, Lord Chief Justice of England, as President.

§ 15. The treaty of arbitration must stipulate the principles according to which the arbitrators have to give their verdict. These principles may be the general rules of International Law, but they may also be the rules of any Municipal Law chosen by the conflicting States, or rules of natural equity, or rules specially stipulated in the treaty of arbitration for the special case.<sup>1</sup> And it may also happen that the treaty of arbitration stipulates that the arbitrators shall compromise the conflicting claims of the parties without resorting to special rules of law. The treaty of arbitration, further, regularly stipulates the procedure to be followed by the arbitrators investigating and determining the difference. If a treaty of arbitration does not lay down rules of procedure, the

On what principles Arbitrators proceed and decide.

<sup>1</sup> See below, § 335, concerning the "Three rules of Washington."



arbitrators themselves have to work out such rules and to communicate them to the parties.

Binding  
force of  
arbitral  
verdict.

§ 16. An arbitral verdict is final if the arbitration treaty does not stipulate the contrary, and the verdict given by the arbitrators is binding upon the parties. As, however, no such central authority exists above the States as could execute the verdict against a State refusing to submit, it is in such a case the right of the other party to enforce the arbitral decision by compulsion. Yet it is obvious that an arbitral verdict is binding under the condition only that the arbitrators have in every way fulfilled their duty as umpires and have been able to find their verdict in perfect independence. If they have been bribed or have not followed their instructions, if their verdict has been given under the influence of coercion of any kind, or if one of the parties has intentionally and maliciously led the arbitrators into an essential material error, the arbitral verdict has no binding force whatever.

What dif-  
ferences  
can be  
decided  
by Arbitra-  
tion.

§ 17. It is often maintained that every possible difference between States could not be determined by arbitration, and, consequently, efforts are made to distinguish those groups of State differences which are determinable by arbitration from the others. Now, although all the States may never consent to have all possible differences decided by arbitration, theoretically there is no reason for a distinction between differences decidable and undecidable through arbitration. For there can be no doubt that, the consent of the parties once given, every possible difference might be settled through arbitration, whether the verdict is based on the rules of International Law or rules of natural equity, or the opposing claims are compromised. But, different from the

theoretical question, what differences are and what are not determinable by arbitration, is the question what kind of State differences *ought* always to be settled in this manner. The latter question has been answered by article 16 of the Hague Convention for the peaceful adjustment of international differences, the signatory Powers therein recognising arbitration as the most efficacious and at the same time the most equitable means of determining differences of a judicial character in general, and in especial differences regarding the interpretation or application of international treaties. But future experience must decide whether the signatory Powers will in practice always act according to this distinction. One cannot help thinking that under certain circumstances and conditions a State might refuse to consent to arbitration upon even such difference as has a judicial character. However, it must be mentioned that several States, following the suggestion of this article 16, have concluded treaties in which they agree to settle differences of a legal nature by arbitration, provided these differences do not affect the vital interests, the independence, or the honour of the contracting parties. Thus Great Britain in 1903 and 1904 entered into arbitration agreements of this kind with France, Spain, Italy, Germany, Sweden, Norway, Portugal, and Austria-Hungary. Although these agreements were concluded for five years only, they will certainly be renewed. And the fact is of importance that Denmark and Holland, on February 12, 1904, entered into an arbitration agreement according to which all differences, without exception, have to go before an arbitration tribunal.<sup>1</sup>

<sup>1</sup> Already on July 23, 1898— XXIX. p. 137 — Argentina and see Martens, N.R.G., 2nd ser. Italy had concluded a treaty

Value  
of Arbitra-  
tion.

§ 18. There can be no doubt that arbitration is, and with every day becomes more and more, of great importance. History proves that already in antiquity and during the Middle Ages arbitration was occasionally<sup>1</sup> made use of as a peaceable means of settling international differences. But, although an International Law made its appearance in modern times, during the sixteenth, seventeenth, and eighteenth centuries very few cases of arbitration occurred. It was not before the end of the eighteenth century that arbitration was frequently made use of. There are 177 cases from 1794 to the end of 1900.<sup>2</sup> This number shows that the inclination of States to agree to arbitration has increased, and there can be no doubt that arbitration has a great future. States and the public opinion of the whole world become more and more convinced that there are a good many international differences which may well be determined by arbitration without any danger whatever to the national existence, independence, dignity, and prosperity of the States concerned. A net of so-called Peace Societies has spread over the whole world, and their members unceasingly work for the promotion of arbitration. The Parliaments of several countries have repeatedly given their vote in favour of arbitration; and the Hague Peace Conference of 1899 created a permanent Court of Arbitration, a step by which a new epoch of the development of International Law was inaugurated.

according to which all differences without exception shall be settled by arbitration. See also above, § 3, concerning the Compromise Clause.

<sup>1</sup> See examples in Calvo, III. §§ 1707-1712, and in Nys, Les

origines du droit international (1894), pp. 52-61.

<sup>2</sup> See La Fontaine's *Histoire sommaire et chronologique des arbitrages internationaux* in R.I., 2nd ser. IV. pp. 349, 558, 623.

V

ARBITRATION ACCORDING TO THE HAGUE CONVENTION

Holls, "The Peace Conference at the Hague" (1900)—Martens, "La conférence de la paix à la Haye" (1900)—Mérignhac, "La conférence internationale de la paix" (1900).

§ 19. Of the 61 articles of the Hague Convention for the peaceful adjustment of international differences, not fewer than 43—namely, articles 15-57—deal with arbitration in three chapters headed "On Arbitral Justice," "On the Permanent Court of Arbitration," and "On Arbitral Procedure." The first chapter, articles 15-19, contains rules on arbitral justice in general, which are, however, with one exception, not of a legal but of a mere doctrinal character. Thus the definition of article 15, "International arbitration has for its object the determination of controversies between States by judges of their own choice, upon the basis of respect for law," is as doctrinal as the assertion of article 16: "In questions of a judicial character, and especially in questions regarding the interpretation or application of International Treaties or Conventions, arbitration is recognised by the signatory Powers as the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods." And the provision of article 17, that an agreement of arbitration may be made respecting disputes already in existence or arising in the future and may relate to every kind of controversy or solely to controversies of a particular character, is as doctrinal as the reservation of article 19, which runs: "Independently of existing general or special treaties imposing the obligation to

Arbitral  
Justice in  
general.

have recourse to arbitration on the part of any of the signatory Powers, these Powers reserve to themselves the right to conclude, either before the ratification of the present Convention or afterwards, new general or special agreements with a view to extending obligatory arbitration to all cases which they consider possible to submit to it." The only rule of legal character is that of article 18, enacting the already existing customary rule of International Law, that "the agreement of arbitration implies the obligation to submit in good faith to the arbitral sentence."

On the signatory Powers no obligation whatever is imposed to submit any difference to arbitration. Even differences of a judicial character, and especially those regarding the interpretation or application of treaties, for the settlement of which the signatory Powers in article 16 acknowledge arbitration as the most efficacious and at the same time the most equitable method, need not necessarily be submitted to arbitration. It should, however, be mentioned that originally a stipulation was intended which made arbitration obligatory for several kinds of differences.<sup>1</sup>

<sup>1</sup> According to Holls, *The Peace Conference at the Hague*, p. 227, this stipulation was as follows:

"From and after the ratification of the present treaty by all the signatory Powers, arbitration shall be obligatory in the following cases so far as they do not affect vital interests or the national honour of the contracting States.

"(I) In the case of differences or conflicts regarding pecuniary damages suffered by a State or its citizens, in consequence of illegal or negligent action on the part of any State or the citizens of the latter.

"(II) In the case of disagreements or conflicts regarding the interpretation or application of

treaties or conventions upon the following subjects:

"1. Treaties concerning postal and telegraphic service and railways, as well as those having for their object the protection of submarine telegraphic cables; Rules concerning the means of preventing collisions on the high seas; Conventions concerning the navigation of international rivers and inter-oceanic canals.

"2. Conventions concerning the protection of literary and artistic property, as well as industrial and proprietary rights (patents, trade marks, and commercial names); Conventions regarding monetary affairs, weights and measures;

§ 20. According to article 31 the conflicting States which resort to arbitration shall sign a special act, in which the object of their difference is clearly defined, as well as the extent of the powers of the arbitrators. The parties may agree to have recourse to the permanent Court of Arbitration which was instituted by the Hague Convention and regarding which details have been given above, Vol. I., §§ 472-476, but they may also assign the arbitration to one or several arbitrators chosen by them either from the members of the permanent Court of Arbitration or elsewhere (article 32). If they choose a head of a State as arbitrator, the whole of the arbitral procedure is to be determined by him (article 33). If they choose several arbitrators, an umpire is to preside, but in case they have not chosen an umpire, the arbitrators are to elect one of their own number as president (article 34). In case of death, resignation, or disability from any cause of one of the arbitrators, his place is to be filled in accordance with the method of his appointment (article 35). The place of session of the arbitrators is to be determined by the parties; but if they fail to do it, the place of session is to be the Hague, and the place of session cannot, except in case of *force majeure*, be changed by the arbitrators without the consent of the parties (article 36). The International Bureau<sup>1</sup> of the Court at the Hague is authorised to put its offices and its staff at the disposal of the signatory Powers in case the parties have preferred to bring their dispute

Arbitration Treaty and appointment of Arbitrators.

Conventions regarding sanitary affairs and veterinary precautions and measures against the phylloxera.

"3. Conventions regarding inheritances, extradition, and mutual

judicial assistance.

"4. Boundary Conventions or Treaties, so far as they concern purely technical and not political questions."

<sup>1</sup> See above, Vol. I. § 474.

## 24 AMICABLE SETTLEMENT OF STATE DIFFERENCES

before other arbitrators than the permanent Court of Arbitration (article 26).

Procedure  
of and  
before the  
Arbitral  
Tribunal.

§ 21. The parties can agree upon such rules of arbitral procedure as they like. If they fail to stipulate special rules of procedure, the following rules are valid, whether the parties have brought their case before the permanent Court of Arbitration or have chosen other arbitrators (article 30) :—

(1) The parties can appoint counsel or advocates for the defence of their rights before the tribunal. They can also appoint delegates or special agents to attend the tribunal for the purpose of serving as intermediaries between them and the tribunal (article 37).

(2) The tribunal selects the language for its own use and authorised for use before it (article 38).

(3) As a rule the arbitral procedure is divided into the two distinct phases of preliminary proceedings and of discussion in Court. Preliminary proceedings consist in the communication by the respective agents to the members of the tribunal and to the opposite party of all printed or written acts and of all documents containing the arguments invoked in the case. This communication is to be made in the form and within periods fixed by the tribunal (article 39); for the latter is authorised to issue rules of procedure for the conduct of the case, to determine the form and periods of time in which each party must conclude its arguments, and to prescribe all formalities required for dealing with the evidence (article 49). Every document produced in the preliminary proceedings by one party must be communicated to the other party (article 40).

(4) Upon the conclusion of the preliminary proceedings follows the discussion in Court; it consists

in the oral development before the tribunal of the arguments of the parties (article 39). The discussions are under the direction of the president of the tribunal, and are public only if it be so decided by the tribunal with the consent of the parties. Minutes are to be drawn up with regard to the discussion by secretaries appointed by the president, and these official minutes alone are authentic (article 41). During the discussion in Court the agents and counsel of the parties are authorised to present to the tribunal orally all the arguments they may think expedient in support of their case. They are likewise authorised to raise objections and to make incidental motions, but the decisions of the tribunal on these objections and motions are final and cannot form the object of any further discussion (articles 45, 46). Every member of the tribunal may put questions to the agents and counsel of the parties and demand explanations from them on doubtful points, but neither such questions nor other remarks made by members of the tribunal can be regarded as expressions of opinion by the tribunal in general or the respective member in particular (article 47). The tribunal can always require from the agents of the parties all necessary explanations and the production of all acts, and in case of refusal the tribunal takes note of it in the minutes (article 44).

When the competence of the tribunal is doubted on one or more points, the tribunal itself is authorised to decide whether it is or is not competent, by means of interpretation of the arbitration treaty or of other treaties which may be invoked in the case, and by means of the application of the principles of International Law (article 48).



During the discussion in Court—article 42 says, “After the conclusion of the preliminary proceedings”—the tribunal is competent to refuse admittance to all such fresh acts and documents as one party may desire to submit to the tribunal without the consent of the other party (article 42). Consequently, the tribunal must admit such fresh acts and documents when both parties agree to their submission. On the other hand, the tribunal is always competent to take into consideration fresh acts and documents to which its attention is drawn by the agents or counsel of the parties, and in such cases the tribunal can require proof of these acts and production of the documents, but it is at the same time obliged to show the latter to the other party (article 43).

As soon as the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the president declares the discussion closed (article 50).

Arbitral  
Award.

§ 22. The arbitral award is given after a deliberation which takes place with closed doors. The members of the tribunal vote, and the majority of the votes makes the decision of the tribunal. In case a member refuses to vote, a note of it must be made in the minutes (article 51). The decision, accompanied by a statement of the considerations upon which it is based, is to be drawn up in writing and to be signed by each member of the tribunal; the dissenting members, however, may record their dissent when signing (article 52). The verdict is read out at a public meeting of the tribunal, the agents and counsel of the parties being present or having been duly summoned to attend (article 53).

Binding  
force of  
Awards.

§ 23. The award, when duly pronounced and

notified to the agents of the parties, decides the dispute finally and without appeal (article 54). The parties may, however, beforehand stipulate in the treaty of arbitration the possibility of an appeal. In such case, and the treaty of arbitration failing to stipulate the contrary, the demand for a rehearing of the case must be addressed to the tribunal which pronounced the award. The demand for a rehearing of the case can only be made on the ground of the discovery of some new fact such as may exercise a decisive influence on the award, and which at the time when the discussion was closed was unknown to the tribunal as well as to the appealing party. Proceedings for a rehearing can only be opened after a decision of the tribunal expressly stating the existence of a new fact of the character described, and declaring the demand admissible on this ground. The treaty of arbitration must stipulate the period of time within which the demand for a rehearing must be made (article 55).

The Hague Convention contains no stipulation whatever with regard to the question whether the award is binding under all circumstances and conditions, or whether it is only binding when the tribunal has in every way fulfilled its duty and has been able to find its verdict in perfect independence. But it is obvious that the award has no binding force whatever if the tribunal has been bribed or has not followed the parties' instructions given by the treaty of agreement; if the award was given under the influence of undue coercion; or, lastly, if one of the parties has intentionally and maliciously led the tribunal into an essential material error.<sup>1</sup>

<sup>1</sup> See above, § 16.

Award  
binding  
upon  
Parties  
only.

§ 24. The award is binding only upon the parties to the treaty of arbitration. But when there is a question of interpreting a convention to which other States than the States at variance are parties, the conflicting States have to notify to such other States the treaty of arbitration they have concluded. Each of these States has a right to intervene in the case before the tribunal, and, if one or more avail themselves of this right, the interpretation contained in the award is as binding upon them as upon the conflicting parties (article 56).

Costs of  
Arbitra-  
tion.

§ 25. Each party pays its own expenses and an equal share of those of the tribunal (article 57).

## CHAPTER II

### COMPULSIVE SETTLEMENT OF STATE DIFFERENCES

#### I

#### ON COMPULSIVE MEANS OF SETTLEMENT OF STATE DIFFERENCES IN GENERAL

Lawrence, § 156—Phillimore, III. § 7—Pradier-Fodéré, VI. No. 2632—  
Fiore, II. No. 1225—Taylor, § 431.

§ 26. Compulsive means of settlement of differences are measures containing a certain amount of compulsion taken by a State for the purpose of making another State consent to such settlement of a difference as is required by the former. There are four different kinds of such means in use—namely, retorsion, reprisals (including embargo), pacific blockade, and intervention. But it must be mentioned that, whereas every amicable means of settling differences might find application in every kind of difference, not every compulsive means is applicable in every difference. For the application of retorsion is confined to political, and that of reprisals to legal differences.

Concep-  
tion and  
kinds of  
Compul-  
sive  
Means of  
Settle-  
ment.

§ 27. War is very often enumerated among the compulsive means of settling international differences. This is in a sense correct, for a State might make war for no other purpose than that of compelling another State to settle a difference in the way required before war was declared. Nevertheless, the characteristics of compulsive means of

Compul-  
sive  
Means in  
contradis-  
tinction  
to War.

settling international differences make it a necessity to draw a sharp line between these means and war. It is, firstly, characteristic of compulsive means that, although they frequently consist of harmful measures, they are neither by the conflicting nor by other States considered as acts of war, and consequently all relations of peace, such as diplomatic and commercial intercourse, the execution of treaties, and the like, remain undisturbed. Compulsive means are in theory and practice considered peaceable, although not amicable, means of settling international differences. It is, further, characteristic of compulsive means that they are even at their worst confined to the application of certain harmful measures only, whereas belligerents in war may apply any amount and any kinds of force, with the exception only of those methods forbidden by International Law. And, thirdly, it is characteristic of compulsive means that their application must cease as soon as their purpose is realised by the compelled State declaring its readiness to settle the difference in the way requested by the compelling State; whereas, war once broken out, a belligerent is not obliged to lay down arms if and when the other belligerent is ready to comply with the request made before the war. As war is the *ultima ratio* between States, the victorious belligerent is not legally prevented from imposing upon the defeated any conditions he likes.

Compulsive Means in contradistinction to an Ultimatum and Demonstrations.

§ 28. The above-described characteristics of compulsive means for the settlement of international differences make it necessary to mention the distinction between such means and an *ultimatum*. The latter is the technical term for a written communication by one State to another which ends amicable negotiations

respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted. An *ultimatum* is, theoretically at least, not a compulsion, although it may practically exercise the function of a compulsion, and although compulsive means, or even war, may be threatened through the same communication in the event of a refusal to comply with the demand made.<sup>1</sup> And the same is valid with regard to withdrawal of diplomatic agents, and to military and naval demonstrations, which some publicists<sup>2</sup> enumerate among the compulsive means of settlement of international differences. Although these steps may contrive, indirectly, the settlement of differences, yet they do not contain in themselves any compulsion.

## II

### RETORSION

Vattel, II. § 341—Hall, § 120—Phillimore, III. § 7—Twiss, II. § 10—Taylor, § 435—Wharton, III. § 318—Wheaton, § 290—Bluntschli, § 505—Heffter, § 110—Bulmerincq in Holtzendorff, IV. pp. 59–71—Ullmann, § 135—Bonfilis, Nos. 972–974—Pradier-Fodéré, VI. Nos. 2634–2636—Rivier, II. § 60—Calvo, III. § 1807—Fiore, II. Nos. 1226–1227—Martens, II. § 105.

§ 29. Retorsion is the technical term for the retaliation of discourteous or unkind or unfair and inequitable acts by acts of the same or a similar kind. Retorsion has nothing to do with international delinquencies, as it is a means of compulsion not in the case of legal differences, but only in the case of certain political differences. The act which calls for retaliation is not an illegal act; on the contrary, it is

Concep-  
tion and  
Character  
of Retor-  
sion.

<sup>1</sup> See Pradier-Fodéré, VI. No. 2649.

<sup>2</sup> See Taylor, §§ 431, 433, 441, and Pradier-Fodéré, VI. No. 2633.

an act that is within the competence of the doer.<sup>1</sup> But a State can commit many legislative, administrative, or judicial acts which, although they are not internationally illegal, contain a discourtesy or unfriendliness to another State or are unfair and inequitable. If the State against which such acts are directed considers itself wronged thereby, a political difference is created which might be settled by retorsion.

Retorsion  
when  
justified.

§ 30. The question when retorsion is and when it is not justified is not one of law, and is difficult to answer. The difficulty is created by the fact that retorsion is a means of settling such differences as are created, not by internationally illegal, but by discourteous or unfriendly or unfair and inequitable acts of one State against another, and that naturally the conceptions of discourtesy, unfriendliness, and unfairness cannot very precisely be defined. It depends, therefore, largely upon the circumstances and conditions of the special cases whether a State will or will not consider itself justified in making use of retorsion. In practice States have frequently made use of retorsion in cases of unfair treatment of their citizens abroad through rigorous passport regulations, exclusion of foreigners from certain professions, and in cases of the levy of exorbitant protectionist or fiscal duties, of refusal of the usual mutual judicial assistance, of refusal of admittance of foreign ships to harbours, and in similar cases.

<sup>1</sup> It is for this reason that—see Heilborn, *System*, p. 352, and Wagner, *Zur Lehre von den Streiterledigungsmitteln des Völkerrechts* (1900), pp. 53-60—it is correctly maintained that retorsion, in contradistinction to reprisals, is not of legal, but only

of political importance. Nevertheless, a system of the Law of Nations must not drop the matter of retorsion altogether, because retorsion is in practice an important means of settling political differences.

§ 31. The essence of retorsion consists in retaliation for a noxious act by an act of the same kind. But a State in making use of retorsion is by no means confined to acts of the same kind as those complained of, acts of a similar kind being equally admissible. However, the acts of retorsion are confined to acts which are not internationally illegal. And, further, as retorsion is made use of only for the purpose of compelling a State to alter its discourteous, unfriendly, or unfair behaviour, all acts of retorsion ought at once to cease when such State changes its behaviour.

Retorsion  
how ex-  
ercised.

§ 32. The value of retorsion as a means of settling certain international differences consists in its compulsory force, which has great power in regulating the intercourse of States. It is a commonplace of human nature, and by experience constantly confirmed, that evil-doers are checked by retaliation, and that those who are inclined to commit a wrong against others are often prevented by the fear of it. Through the high tide of Chauvinism, Protectionism, and unfriendly feelings against foreign nations, States are often tempted to legislative, administrative, and judicial acts against other States which, although not internationally illegal, nevertheless endanger the friendly relations and intercourse within the Family of Nations. The certainty of retaliation is the only force which can make States resist the temptation.

Value of  
Retorsion.



## III

## REPRISALS

Grotius, III. c. 2—Vattel, II. §§ 342-354—Bynkershoek, *Quaestiones jur. publ.* I. c. 24—Hall § 120—Lawrence, §§ 157-158—Twiss, II. §§ 11-22—Taylor, §§ 436-437—Wharton, III. §§ 318-320—Wheaton, §§ 291-293—Bluntschli, §§ 500-504—Heffter, §§ 111-112—Bulmerincq in Holtzendorff, IV. pp. 72-116—Ullmann, §§ 136-137—Bonfilis, Nos. 975-985—Pradier-Fodéré, VI. Nos. 2637-2647—Rivier, II. § 60—Calvo, III. §§ 1808-1831—Fiore, II. Nos. 1228-1230—Martens, II. § 105—Lafargue, "Les représailles en temps de paix" (1899)—Ducrocq, "Représailles en temps de paix" (1901), pp. 5-57, 175-232.

Concep-  
tion of  
Reprisals  
in contra-  
distinc-  
tion to  
Retorsion.

§ 33. Reprisals is the term applied to such injurious and otherwise internationally illegal acts of a State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency. Whereas retorsion consists in retaliation of discourteous, unfriendly, unfair, and inequitable acts by acts of the same or a similar kind, and has nothing to do with international delinquencies, reprisals are otherwise illegal acts performed by a State for the purpose of obtaining justice for an international delinquency by taking the law into its own hands. It is, of course, possible that a State retaliates to an illegal act committed against itself by the performance of an act of a similar kind. Such retaliation would be a retorsion in the ordinary sense of the term, but it would not be retorsion in the technical meaning of the term as used by those writers on International Law who correctly distinguish between retorsion and reprisals.

Reprisals  
admissible  
for all  
Inter-  
national  
Delin-  
quencies.

§ 34. Reprisals are admissible not only, as some writers<sup>1</sup> maintain, in case of denial or delay of justice or of any other internationally interdicted ill-treat-

<sup>1</sup> See, for instance, Twiss, II. § 19.

ment of foreign citizens, but in every case of an international delinquency for which the injured State cannot get reparation through negotiation, be it ill-treatment of its subjects abroad through denial or delay of justice or otherwise, or be it non-compliance with treaty obligations, violation of the dignity of a foreign State, violation of foreign territorial supremacy, or any other internationally illegal act. Thus Great Britain, in the case of the Sicilian Sulphur Monopoly, performed acts of reprisals against the Two Sicilies in 1840 for a violation of a treaty. By the treaty of commerce of 1816 between the Two Sicilies and Great Britain certain commercial advantages were secured to Great Britain. When, in 1838, the Neapolitan Government granted a Sulphur Monopoly to a company of French and other foreign merchants, Great Britain protested against this violation of her treaty rights, demanded the revocation of the monopoly, and, the Neapolitan Government declining to comply with this demand, laid an *embargo* on Sicilian ships in the harbour of Malta and ordered her fleet in the Mediterranean to seize Sicilian ships by way of reprisals. A number of vessels were captured, but were restored after the Sicilies had, through the mediation of France, agreed to withdraw the grant of the Sulphur Monopoly.

§ 35. Reprisals are admissible for international delinquencies only and exclusively. As internationally injurious acts on the part of administrative and judicial officials, armed forces, and private individuals are not *ipso facto* international delinquencies, no reprisals are admissible for such acts in case the responsible State complies with the requirements of its vicarious responsibility.<sup>1</sup> Should, however, a

Reprisals  
admissible  
for Inter-  
national  
Delin-  
quencies  
only.

<sup>1</sup> See above, Vol. I. §§ 149 and 150.

State refuse to comply with these requirements, its vicarious responsibility would turn into original responsibility, and thereby an international delinquency would be created for which reprisals are admissible indeed.

The reprisals ordered by Great Britain in the case of Don Pacifico are an illustrative example of unjustified reprisals, because no international delinquency was committed. In 1847 a riotous mob, aided by Greek soldiers and gendarmes, broke into and plundered the house of Don Pacifico, a native of Gibraltar and an English subject living at Athens. Great Britain claimed damages from Greece without previous recourse by Don Pacifico to the Greek Courts. Greece refused to comply with the British claim, maintaining correctly that Don Pacifico ought to institute an action for damages against the rioters before the Greek Courts. Great Britain continued to press her claim, and finally in 1850 blockaded the Greek coast and ordered, by way of reprisals, the capture of Greek vessels. The conflict was eventually settled by Greece paying 150*l.* to Don Pacifico. It is generally recognised that England had no right to act as she did in this case. She could have claimed damages directly from the Greek Government only after the Greek Courts had denied satisfaction to Don Pacifico.<sup>1</sup>

Reprisals  
by whom  
per-  
formed.

§ 36. Acts of reprisals can nowadays be performed only by State organs such as armed forces, or men-of-war, or administrative officials, in compliance with a special order of their State. But in former times private individuals used to perform acts of reprisals. Such private acts of reprisals seem to have been in

<sup>1</sup> See above, Vol. I. § 167. The case is reported with all its details in Martens, *Causes Célèbres*, V. pp. 395-531.

vogue already in antiquity, for there existed a law in Athens according to which the relatives of an Athenian murdered abroad had, in case the foreign State refused punishment or extradition of the murderer, the right to seize and to bring before the Athenian Courts three citizens of such foreign State (so-called *ἀνδροληψία*). During the Middle Ages, and even in modern times to the end of the eighteenth century, States used to grant so-called "Letters of Marque" to such of their subjects as had been injured abroad either by a foreign State itself or its citizens without being able to get redress. These Letters of Marque authorised the bearer to acts of self-help against the State concerned, its citizens and their property, for the purpose of obtaining satisfaction for the wrong sustained. In later times, however, States themselves also performed acts of reprisals. Thereby acts of reprisals on the part of private individuals fell more and more into disuse, and finally disappeared totally with the end of the eighteenth century. The distinction between general and special reprisals, which used to be drawn formerly, is based on the fact that in former times a State could either authorise a single private individual to perform an act of reprisals (*special* reprisals), or command its armed forces to perform all kinds of such acts (*general* reprisals). The term "General Reprisals" is by Great Britain nowadays used for the authorisation of the British fleet to seize in time of war all enemy ships and goods. Phillimore (III. § 10) cites the following Order in Council of March 27, 1854: "Her Majesty having determined to afford active assistance to her ally, His Highness the Sultan of the Ottoman Empire, for the protection of his dominions against the encroachments and unprovoked

aggression of His Imperial Majesty the Emperor of All the Russias, Her Majesty is therefore pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels, and goods of the Emperor of All the Russias, and of his subjects, or others inhabiting within any of his countries, territories or dominions, so that Her Majesty's fleets may lawfully seize all ships, vessels, and goods," &c.

Objects of  
Reprisals.

§ 37. An act of reprisal can be performed against anything and everything that belongs or is due to the delinquent State or its citizens. Ships sailing under its flag may be seized, treaties concluded with it may be suspended, a part of its territory may be militarily occupied, goods belonging to it or to its citizens may be seized, and the like. Thus in 1901 France ordered a fleet to seize the island of Mitylene as an act of reprisals against Turkey. The persons of the officials and even of the private citizens of the delinquent State are not excluded from the possible objects of reprisals. Thus, when in 1740 the Empress Anne of Russia arrested without just cause the Baron de Stackelberg, a natural-born Russian subject, who had, however, become naturalised in Prussia by entering the latter's service, Frederick II. of Prussia seized by way of reprisals two Russian subjects and detained them until Stackelberg was liberated. But it must be emphasised that the only act of reprisals admissible with regard to foreign officials or citizens is arrest; they must not be treated like criminals, but like hostages, and it is under no condition or circumstance allowed to execute them or to subject them to punishment of any kind.

The rule that anything and everything belonging to the delinquent State may be made the object of

reprisals has, however, exceptions; for instance, individuals enjoying the privilege of ex-territoriality while abroad, such as heads of States and diplomatic envoys, cannot be made the object of reprisals, although this has occasionally been done in practice.<sup>1</sup> In regard to another exception—namely, public debts of such State as intends performing reprisals—unanimity exists neither in theory nor in practice. When Frederick II. of Prussia in 1752, by way of negative reprisals for an alleged injustice of British Prize Courts against Prussian subjects, refused the payment of the Silesian loan due to English creditors, Great Britain maintained, apart from denying the question that there was at all a just cause for reprisals, that public debts cannot be made the object of reprisals. English jurists and others, as, for instance, Vattel (II. § 344), consent to this, but German writers dissent.<sup>2</sup>

§ 38. Reprisals may be positive or negative. One speaks of positive reprisals when such acts are performed as under ordinary circumstances would involve an international delinquency. On the other hand, negative reprisals consist of refusals to perform such acts as are under ordinary circumstances obligatory; when, for instance, the fulfilment of a treaty obligation or the payment of a debt is refused.

Positive  
and  
Negative  
Reprisals.

§ 39. Reprisals, be they positive or negative, must be in some proportion to the wrong done and to the amount of compulsion necessary to get reparation. For instance, a State would not be justified in arresting by way of reprisals thousands of foreign subjects

Reprisals  
must be  
proportionate.

<sup>1</sup> See the case reported in all its details in Martens, *Causes Martens, Causes Célèbres*, I. p. 35. *Célèbres*, II. pp. 97-168. The dispute was settled in 1756—see below, § 437—through Great Britain paying an indemnity of 20,000l.

<sup>2</sup> See Phillimore, III. § 22, in contradistinction to Heffter, § 111, note 5. The case is reported with

living on its territory whose home State has injured it through a denial of justice to one of its subjects living abroad. But it would in such case be justified in ordering its own Courts to deny justice to all subjects of such foreign State, or in ordering its fleet to seize several vessels sailing under the latter State's flag, or in suspending its commercial treaty with such State.

**Embargo.** § 40. A kind of reprisals, which is called *Embargo*, must be specially mentioned. This term of Spanish origin means detention, but in International Law it has the technical meaning of detention of ships in port. Now, as by way of reprisals all kinds of otherwise illegal acts may be performed, there is no doubt that ships of the delinquent State may be prevented from leaving the ports of the injured State for the purpose of compelling the delinquent State to make reparation for the wrong done.<sup>1</sup>

The matter need not be specially mentioned at all were it not for the fact that *embargo* by way of reprisals is to be distinguished from detention of ships for other reasons. According to a now obsolete rule of International Law, the conflicting States could, when war was breaking out or impending, lay an *embargo* on each other's vessels. Another kind of *embargo* is the so-called *arrêt de prince*—that is, a detention of foreign ships for the purpose of preventing them from spreading news of political importance. And there is, thirdly, an *embargo* arising out of the so-called *jus angariæ*—that is, the right of a belligerent State to seize and make use of neutral property in case of necessity, under the obligation to compensate the

<sup>1</sup> Thus in 1840—see above, §34—Great Britain laid an embargo on Sicilian ships.

neutral owner of such property. States have in the past<sup>1</sup> made use of this kind of *embargo* when they had not enough ships for the necessary transport of troops, ammunition, and the like.

All these kinds of international *embargo* must not be confounded with the so-called *civil embargo* of English Municipal Law<sup>2</sup>—namely, the order of the Sovereign to English ships not to leave English ports.

§ 41. Like all the other compulsive means of settling international differences, reprisals are admissible only after negotiations have been conducted in vain for the purpose of obtaining reparation from the delinquent State. In former times, when States used to authorise private individuals to perform special reprisals, treaties of commerce and peace frequently stipulated for a certain period of time, for instance three or four months, to elapse after an application for redress before the grant of Letters of Marque by the injured State.<sup>3</sup> Although with the disappearance of special reprisals this is now antiquated, a reasonable time for the performance of a reparation must even nowadays be given. On the other hand, reprisals must at once cease when the delinquent State makes the necessary reparation. Individuals arrested must be set free, goods and ships seized must be handed back, occupied territory must be evacuated, suspended treaties must again be put into force, and the like.

§ 42. Reprisals in time of peace must not be confounded with reprisals between belligerents. Whereas the former are resorted to for the purpose of settling a conflict without going to war, the latter<sup>4</sup> are retaliations to force an enemy guilty of a certain act of illegitimate warfare to comply with the laws of war.

Reprisals to be preceded by Negotiations and to be stopped when Reparation is made.

Reprisals during Peace in contradistinction to Reprisals during War.

<sup>1</sup> See below, § 364.

<sup>2</sup> See Phillimore, III. § 26.

<sup>3</sup> See Phillimore, III. § 14.

<sup>4</sup> See below, § 247.



**Value of  
Reprisals.**

§ 43. The value of reprisals as a means of settling international differences is analogous to the value of retorsion. States will have recourse to reprisals for such international delinquencies as they think insufficiently important for a declaration of war, but too important to be entirely overlooked. That reprisals are rather a rough means for the settlement of differences, and that the institution of reprisals may give and has in the past given occasion to abuse in case of a difference between a powerful and a weak State, cannot be denied. On the other hand, as there is no Court and no central authority above the Sovereign States which could compel a delinquent State to give reparation, the institution of reprisals can scarcely be abolished. The influence in the future of the existence of a permanent Court of Arbitration remains to be seen. If all the States would become parties to the Hague Convention for the peaceful adjustment of international differences, and if they would have recourse to the Permanent Court of Arbitration at the Hague in all cases of an alleged international delinquency which affects neither their national honour nor their independence, acts of reprisals would almost disappear.

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## IV

## PACIFIC BLOCKADE

Hall, § 121—Lawrence, § 159—Taylor, § 444—Bluntschli, §§ 506-507—Heffter, § 112—Bulmerincq in Holtzendorff, IV. pp. 116-127—Ullmann, § 138—Bonfils, Nos. 986-994—Pradier-Fodéré, V. Nos. 2483-2489, VI. No. 2648—Rivier, II. § 60—Calvo, III. §§ 1832-1859—Fiore, II. No. 1231—Martens, II. 105—Holland, *Studies*, pp. 151-167—Deane, "The Law of Blockade" (1870) pp. 45-48—Fauchille, "Du blocus maritime" (1882) pp. 37-67—Falcke, "Die Hauptperioden der sogenannten Friedensblockade" (1891)—Barès, "Le blocus pacifique" (1898)—Ducrocq, "Représailles en temps de paix" (1901) pp. 58-174.

§ 44. Before the nineteenth century blockade was only known as a measure between belligerents in time of war. It was not before the second quarter of the nineteenth century that the first case occurred of a so-called pacific blockade—that is, a blockade during time of peace—as a compulsive means of settling international differences; and all such cases are either cases of intervention or of reprisals.<sup>1</sup> The first case, one of intervention, happened in 1827, when, during the Greek insurrection, Great Britain, France, and Russia intervened in the interest of the independence of Greece and blockaded those parts of the Greek coast which were occupied by Turkish troops. Although this blockade led to the battle of Navarino, in which the Turkish fleet was destroyed, the Powers maintained, nevertheless, that they were not at war

Develop-  
ment of  
practice  
of Pacific  
Blockade.

<sup>1</sup> A blockade instituted by a State against such portions of its own territory as are in revolt is not a blockade for the purpose of settling international differences. It has, therefore, in itself nothing to do with the Law of Nations, but is a matter of internal police. I cannot, therefore, agree with Professor Holland, who, in his *Studies in International Law*,

p. 138, treats it as a pacific blockade *sensu generali*. Of course, necessity of self-preservation only can justify a State that has blockaded one of its own ports in preventing the egress and ingress of *foreign* vessels. And the question might arise whether compensation is not to be paid for losses sustained by such foreign vessels.

with Turkey. In 1831, France blockaded the Tagus as an act of reprisals for the purpose of exacting redress from Portugal for injuries sustained by French subjects. Great Britain and France, exercising intervention for the purpose of making Holland consent to the independence of revolting Belgium, blockaded in 1833 the coast of Holland. In 1838, France blockaded the ports of Mexico as an act of reprisals, but Mexico declared war against France in answer to this pacific blockade. Likewise as an act of reprisals, and in the same year, France blockaded the ports of Argentina; and in 1845, conjointly with Great Britain, France blockaded the ports of Argentina a second time. In 1850, in the course of her differences with Greece on account of the case of Don Pacifico,<sup>1</sup> Great Britain blockaded the Greek ports, but for Greek vessels only. A case of intervention again is the pacific blockade instituted in 1860 by Sardinia, in aid of an insurrection against the then Sicilian ports of Messina and Gaeta, but the following year saw the conversion of the pacific blockade into a war blockade. In 1862 Great Britain, by way of reprisals for the plundering of a wrecked British merchantman, blockaded the Brazilian port of Rio de Janeiro. The blockade of the island of Formosa by France during her differences with China in 1884, and that of the port of Menam by France during her differences with Siam in 1893 are likewise cases of reprisals. On the other hand, cases of intervention are the blockade of the Greek coast in 1886 by Great Britain, Austria-Hungary, Germany, Italy, and Russia, for the purpose of preventing Greece from making war against Turkey; and further, the blockade of the island of Crete in 1897 by the united

<sup>1</sup> See above, § 35.

Powers. The last case occurred in 1902, when Great Britain, Germany, and Italy blockaded, by way of reprisals, the coast of Venezuela.<sup>1</sup>

§ 45. No unanimity exists between international lawyers with regard to the question whether or not pacific blockades are admissible according to the principles of the Law of Nations. There is no doubt that the theory of the Law of Nations forbids the condemnation and confiscation of vessels other than those of the blockaded State which are caught in an attempt to break a pacific blockade. For even those writers who maintain the admissibility of pacific blockade assert that such vessels cannot be confiscated. What is controverted is the question whether according to International Law the coast of a State can be blockaded at all in time of peace. From the first recorded instance to the last, several writers<sup>2</sup> of authority have negatived the question. On the other hand, many writers have answered the question in the affirmative, differing among themselves regarding the one point only whether or not vessels sailing under the flag of third States could be prevented from entering or leaving pacifically blockaded ports. The Institute of International Law in 1887 carefully studied, and at its meeting in Heidelberg discussed, the question, and finally voted a declaration<sup>3</sup> in favour of the admissibility of pacific blockades. Thus the most influential body of theorists has approved of what had been

Admissi-  
bility of  
Pacific  
Blockade.

<sup>1</sup> This blockade, although ostensibly a war blockade for the purpose of preventing the ingress of foreign vessels, was nevertheless essentially a pacific blockade. See Holland, in the *Law Quarterly Review*, XIX. (1903), p. 133; *Parliamentary Papers*, Venezuela,

No. 1 (Venezuela), Correspondence respecting the Affairs of Venezuela.

<sup>2</sup> The leader of these writers is Hautefeuille, *Des Droits et des Devoirs des Nations Neutres* (2nd ed. 1858, pp. 272-288.)

<sup>3</sup> See *Annuaire*, IX. (1887), pp. 275-301.

established before by practice. There ought to be no doubt that the numerous cases of pacific blockade which have occurred during the nineteenth century have, through tacit consent of the members of the Family of Nations, established the admissibility of pacific blockades for the settlement of political as well as of legal international differences.

Pacific  
Blockade  
and  
vessels of  
third  
States.

§ 46. It has already been stated that those writers who admit the legality of pacific blockades are unanimous regarding the fact that no right exists for the blockading State to condemn and confiscate such ships of third States as try to break a pacific blockade. Apart from this, no unanimity exists with regard to the question of the relation between a pacific blockade and ships of third States. Some German writers<sup>1</sup> maintain that such ships have to respect the blockade, and that the blockading State has a right to stop such ships of third States as try to break a pacific blockade. The vast majority of writers, however, deny such right. There is, in fact, no rule of International Law which could establish such a right, as pacific in contradistinction to belligerent blockade is a mere matter between the conflicting parties. The declaration of the Institute of International Law in favour of pacific blockade contains, therefore, the condition: "Les navires de pavillons neutres peuvent entrer librement malgré le blocus."

The practice of pacific blockade has varied with regard to ships of third States. Before 1850 ships of third States were expected to respect pacific blockades, and such ships of these States as tried to break it were seized, but were restored at the termination of the blockade, yet without any com-

<sup>1</sup> See Heffter, § 112; Perels, § 30.

pensation. When in 1850 Great Britain, and likewise when in 1886 Great Britain, Austria, Germany, Italy, and Russia blockaded the Greek ports, these ports were only closed for Greek ships, and others were allowed to pass through. And the same was the case during the blockade of Crete in 1897. On the other hand, in 1894 France, during a conflict with China, blockaded the island of Formosa and tried to enforce the blockade against ships of third States. But Great Britain declared that a pacific blockade could not be enforced against ships of third States, whereupon France had to drop her intended establishment of a pacific blockade and had to consider herself at war with China. And when in 1902 Great Britain, Germany, and Italy instituted a blockade against Venezuela, they declared it a war blockade<sup>1</sup> because they intended to enforce it against vessels of third States.

§ 47. Theory and practice seem nowadays to agree upon the rule that the ships of a pacifically blockaded State trying to break the blockade may be seized and sequestered. But they cannot be condemned and confiscated, as they have to be restored at the termination of the blockade. Thus, although the Powers which had instituted a blockade against Venezuela in 1902 declared it a war blockade, all Venezuelan public and private ships seized were restored after the blockade was raised.

Pacific  
Blockade  
and  
vessels of  
the block-  
aded  
State.

§ 48. Pacific blockade is a measure of such enormous consequences that it can be justified only after the failure of preceding negotiations for the purpose of settling the questions in dispute. And further, as blockade, being a violation of the territorial supremacy

Manner  
of Pacific  
Blockade.

<sup>1</sup> That this blockade was essentially a pacific blockade I have already stated above, p. 45, note 1.

of the blockaded State, is *prima facie* of a hostile character, it is necessary for such State as intends in time of peace to blockade another to notify its intention to the latter and to fix the day and hour for the establishment of the blockade. And, thirdly, although the Declaration of Paris of 1856 enacting that a blockade to be binding must be effective concerns blockades in time of war only, there can be no doubt that pacific blockades ought to be likewise effective. The declaration of the Institute of International Law in favour of pacific blockade contains, therefore, the condition : "Le blocus pacifique doit être déclaré et notifié officiellement, et maintenu par une force suffisante."

Value of  
Pacific  
Blockade.

§ 49. As the establishment of a pacific blockade has in various instances not prevented the outbreak of hostilities, the value of a pacific blockade as a means of non-hostile settlement of international differences is doubted and considered precarious by many writers. But others agree, and I think they are right, that the institution of pacific blockade is of great value, be it as an act of reprisals or of intervention. Every measure which is suitable and calculated to prevent the outbreak of war must be welcomed, and experience shows that pacific blockade is, although not universally successful, a measure of such kind. That it may give, and has in the past given, occasion for abuse in case of a difference between a strong and a weak Power is no argument against it, as the same is valid with regard to reprisals and intervention in general, and even to war. And although it is naturally a measure which will scarcely be made use of in case of a difference between two powerful naval States, it might nevertheless find application with success against a powerful naval

State if exercised by the united navies of several Powers.<sup>1</sup>

## V

### INTERVENTION

See the literature quoted above in Vol. I. at the commencement of § 134.

§ 50. Intervention as a means of settling international differences is only a special kind of intervention in general, which has already been discussed.<sup>2</sup> It consists in the dictatorial interference of a third State in a difference between two States for the purpose of settling the difference in the way demanded by the intervening State. This dictatorial interference takes place for the purpose of exercising a compulsion upon one or both of the parties in conflict, and must be distinguished from such attitude of a State as makes it a party to the very conflict. If two States are in conflict and a third State joins one of them out of friendship or from any other motive, such third State does not exercise an intervention as a means of settling international differences, but it becomes a party to the conflict. If, for instance, an alliance exists between one of two States in conflict and a third, and if eventually, as war has broken out in consequence of the conflict, such third State comes to the help of

Intervention in contradiction to Participation in a difference.

<sup>1</sup> The following is the full text of the declaration of the Institute of International Law referred to above, § 45:

"L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit de gens que sous les conditions suivantes:

"1. Les navires de pavillon étranger peuvent entrer librement malgré le blocus.

"2. Le blocus pacifique doit être déclaré et notifié officiellement et maintenu par une force suffisante.

"3. Les navires de la puissance bloquée qui ne respectent pas un pareil blocus, peuvent être séquestrés. Le blocus ayant cessé, ils doivent être restitués avec leurs cargaisons à leurs propriétaires, mais sans dédommagement à aucun titre."

<sup>2</sup> See above, Vol. I. §§ 134-138.



its ally, no intervention in the technical sense of the term takes place. A State intervening in a dispute between two other States does not become a party to their dispute, but is the author of a new imbroglio, because such third State dictatorially requests those other States to settle their difference in a way to which both, or at least one of them, objects. An intervention, for instance, takes place when, although two States in conflict have made up their minds to fight it out in war, a third State dictatorially requests them to settle their dispute through arbitration.

Intervention, in the form of dictatorial interference, must, further, be distinguished from such efforts of a State as are directed to induce the States in conflict to settle their difference amicably by proffering its good offices or mediation, or by giving friendly advice. It is, therefore, incorrect when some jurists<sup>1</sup> speak of good offices and the like as an "amicable" in contradistinction to a "hostile" intervention.

Mode of  
Interven-  
tion.

§ 51. Intervention in a difference between two other States is exercised through a communication of the intervening State to one or both of the conflicting States with a dictatorial request for the settlement of the conflict in a certain way, for instance by arbitration or by the acceptance of certain terms. An intervention can take place either on the part of one State alone or of several States collectively. If the parties comply with the request of the intervening State or States, the intervention is terminated. If, however, one or both of the parties do not comply with the request, the intervening State will either withdraw its intervention or proceed to the performance of acts more stringent than a mere request, such as pacific blockade, military occupation, and the like. Even

<sup>1</sup> Thus, for instance, Rivier, II. § 58. See also above, Vol. I. § 134.

war may be declared for the purpose of an intervention. Of special importance are the collective interventions exercised by several great Powers in the interest of the balance of power and of humanity.<sup>1</sup>

§ 52. An intervention in a difference between two States can take place at any time from the moment a conflict arises till the moment it is settled, and even immediately after the settlement. In many cases interventions have taken place before the outbreak of war between two States for the purpose of preventing war; in other cases third States have intervened during a war which had broken out in consequence of a conflict. Interventions have, further, taken place immediately after the peaceable settlement of a difference, or after the termination of war by a treaty of peace or by conquest, on the grounds that the conditions of the settlement or the treaty of peace were against the interests of the intervening State, or because the latter would not consent to the annexation of the conquered State by the victor.<sup>2</sup>

Time of  
Interven-  
tion.

<sup>1</sup> See above, Vol. I. §§ 136 and 137.

<sup>2</sup> With regard to the question of the right of intervention, the admissibility of intervention in default of a right, and to all other details concerning intervention, the reader must be referred above, Vol. I. §§ 135-138.



**PART II**  
**WAR**



## CHAPTER I

### ON WAR IN GENERAL

#### I

#### CHARACTERISTICS OF WAR

Grotius, I. c. 1, § 2—Vattel, III. §§ 1-4, 69-72—Hall, §§ 15-18—Lawrence, § 155—Lorimer, II. pp. 18-28—Manning, pp. 131-133—Phillimore, III. § 49—Twiss, II. § 22-29—Taylor, §§ 449-451—Wheaton, § 295—Bluntschli, §§ 510-514—Heffter, §§ 113-114—Lueder in Holtzendorff, IV. pp. 175-198—Klüber, §§ 235-237—G. F. Martens, II. § 263—Ullmann, § 141—Bonfil, Nos. 1000-1001—Pradier-Fodéré, VI. Nos. 2650-2660—Rivier, II. § 61—Calvo, IV. §§ 1860-1864—Fiore, III. Nos. 1232-1268—Martens, II. § 106—Westlake, Chapters, pp. 258-264—Heilborn, System, pp. 321-332—Rettich, "Zur Theorie und Geschichte des Rechts zum Kriege" (1888), pp. 3-140—Wiesse, "Le Droit international appliqué aux guerres civiles" (1898)—Rongier, "Les guerres civiles et le droit des gens" (1903).

§ 53. As within the boundaries of the modern State an armed contention between two or more citizens is illegal, public opinion has become convinced that armed contests between citizens are inconsistent with Municipal Law. Influenced by this fact, fanatics of international peace, as well as those innumerable individuals who cannot grasp the idea of a law between Sovereign States, frequently consider war and law inconsistent. They quote the fact that wars are frequently waged by States as a proof against the very existence of an International Law. It is not difficult to show the absurdity of this opinion. As States are Sovereign, and as consequently no

War no  
illegality.

central authority can exist above them able to enforce compliance with its demands, war cannot always be avoided. International Law recognises this fact, but at the same time provides regulations with which the belligerents have to comply. Although with the outbreak of war all peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties. Thus war is not inconsistent with, but a condition regulated by, International Law. The latter cannot and does not object to the States which are in conflict waging war upon each other instead of peaceably settling their difference. But if they choose to go to war they have to comply with the rules laid down by International Law regarding the conduct of war and the relations between the belligerents and neutral States. That International Law, if it could forbid war altogether, would be a more perfect law than it is at present there is no doubt. Yet eternal peace is an impossibility in the conditions and circumstances under which mankind live and perhaps will have to live for ever, although eternal peace is certainly an ideal of civilisation.

Concep-  
tion of  
War.

§ 54. War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases. War is a fact recognised, and with regard to many points regulated, but not established, by International Law. Those writers<sup>1</sup> who define war as the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, forget that wars have often been waged by both parties for political reasons only; they con-

<sup>1</sup> See, for instance, Vattel, III. II. 26; Bluntschli, § 510; Bul-  
§ 1; Phillimore, III. § 49; Twiss, *merincq*, § 92.

found a possible but not at all necessary cause of war with the conception of war. A State may be driven into war because it cannot otherwise get reparation for an international delinquency, and such State may then maintain that it exercises by the war nothing else than legally recognised self-help. But when States are driven into or deliberately wage war for political reasons, no legally recognised act of self-help is in such case performed by the war. And the same laws of war are valid, whether wars are waged on account of legal or of political differences.

§ 55. In any case, it is universally recognised that war is a *contention*, which means, *a violent struggle through the application of armed force*. For a war to be in existence, two or more States must actually have their armed forces fighting against each other, although the commencement of a war may date back to its declaration or some other unilateral initiative act. Unilateral acts of force performed by one State against another may be a cause of the outbreak of war, but are not war in themselves, as long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers the particular acts as acts of war. Thus it comes about that acts of force performed by one State against another by way of reprisals or during a pacific blockade in the case of an intervention are not necessarily initiative acts of war. And even acts of force illegally performed by one State against another, such, for instance, as occupation of a part of its territory, are not acts of war as long as they are not met with acts of force from the other side, or at least with a declaration from the latter that it considers the particular acts as acts of war. Thus, when Louis XIV. of France, after

War a  
contention.



the Peace of Nimeguen, instituted the so-called Chambers of Reunion and in 1680 and 1681 seized the territory of the then Free Town of Strassburg and other parts of the German Empire without the latter's offering armed resistance, these acts of force, although doubtless illegal, were not acts of war.

War a  
contention  
between  
States.

§ 56. To be considered war, the contention must be going on *between States*. In the Middle Ages wars were known between private individuals, so-called private wars, and wars between corporations, as the Hansa for instance, and between States. But such wars have totally disappeared in modern times. It may, of course, happen that a contention arises between the armed forces of a State and a body of armed individuals, but such contention<sup>1</sup> is not war. Thus the contention between the Raiders under Dr. Jameson and the former South African Republic in January 1896 was not war. Nor is a contention with insurgents or with pirates a war. And a so-called civil war<sup>2</sup> need not be from the beginning nor become at all a war in the technical sense of the term according to International Law. On the other hand, to an armed contention between a suzerain and its vassal<sup>3</sup> State the character of war ought not to be denied, for both parties are States, although the fact that the vassal makes war against the suzerain may, from the standpoint of Constitutional Law, be considered rebellion. And likewise an armed contention between a full Sovereign State and a State under the suzerainty of another State, as, for instance, the contention between Servia and Bulgaria in 1885, is war.

<sup>1</sup> Some publicists maintain, for instance, Bluntschli, § 113, and however, that a contention between a State and the armed forces of a party fighting for public rights must be considered as war. See, Fiore, III. § 1265.

<sup>2</sup> See below, § 59.

<sup>3</sup> See below, § 75.

Again, an armed contention between one or more member-States of a Federal State and the latter ought to be considered as war in the technical sense of the term, according to International Law, although, according to the constitution of Federal States, war between the member-States as well as between any member-State and the Federal State itself is illegal, and the recourse to arms by a member-State may therefore correctly, from the standpoint of the constitution, be called a rebellion. Thus the War of Secession within the United States between the Northern and the Southern member-States in 1861-1865 was real war.

§ 57. It must be emphasised that war nowadays is a contention of States *through their armed forces*. Those private subjects of the belligerents who do not directly or indirectly belong to the armed forces do not take part in the armed contention: they do not attack and defend, and no attack is therefore made upon them. This fact is the result of an evolution of practices which were totally different in former times. During antiquity and the greater part of the Middle Ages war was a contention between the whole of the populations of the belligerent States. In time of war every subject of one belligerent, whether an armed and fighting individual or not, whether man or woman, adult or infant, could be killed or enslaved by the other belligerent at will. But gradually a milder and more discriminative practice grew up, and nowadays the life and liberty of such private subjects of belligerents as do not directly or indirectly belong to their armed forces are safe, as is also, with certain exceptions, their private property.

War a  
contention  
between  
States  
through  
armed  
forces.

This is a generally admitted fact. But opinions disagree as to the general position of such private

subjects in time of war. The majority of the European continental writers for the last two generations have propagated the doctrine that no relation of enmity exists between belligerents and such private subjects, or between the private subjects of both belligerents. This doctrine goes back to Rousseau, "Contrat Social," I. c. 4. In 1801, on the occasion of the opening of the French Prize Court, the celebrated lawyer and statesman Portalis adopted Rousseau's doctrine by declaring that war is a relation between States and not between individuals, and that consequently the subjects of the belligerents are only enemies as soldiers, not as citizens. And although this new doctrine did not, as Hall (§ 18) shows, spread at once, it has since the second half of the nineteenth century been proclaimed on the European continent by the majority of writers. English and American-English writers have, however, never adopted this doctrine, but have always maintained that the relation of enmity between the belligerents extends also to their private citizens.

I think, if the facts of war are taken into consideration without prejudice, there ought to be no doubt that the Anglo-American view is correct. It is impossible to sever the citizens from their State, and the outbreak of war between two States cannot but make their citizens enemies. But, on the other hand, the whole controversy is unworthy of dispute, because it is only a terminological controversy without any material consequences. For, apart from the terminology, the parties agree in substance upon the rules of the Law of Nations regarding such private subjects as do not directly or indirectly belong to the armed forces. Nobody doubts that such private individuals are safe as regards their life and liberty, provided

they behave peacefully and loyally, and that, with certain exceptions, their private property must not be touched. On the other hand, nobody doubts that, according to a generally recognised custom of modern warfare, the belligerent who has occupied a part or the whole of his opponent's territory, and who treats such private individuals leniently according to the rule of International Law, can punish them for any hostile act, since they do not enjoy the privileges of members of armed forces. Although, on the one hand, International Law does by no means forbid, and, as a law between States, is not competent to forbid, private individuals to take up arms against an enemy, it gives, on the other hand, the right to the enemy to treat hostilities committed by private<sup>1</sup> individuals as acts of illegitimate warfare. A belligerent is under a duty to respect the life and liberty of private enemy individuals, but he can carry out this duty under the condition only that these private individuals abstain from hostilities against himself. Through military occupation in war such private individuals fall under the territorial supremacy of the belligerent, and he can therefore demand that they comply with his orders regarding the safety of his forces. The position of private enemy individuals is made known to them through the proclamations which the commanders-in-chief of an army occupying the territory usually publish. Thus General Sir Redvers Buller, when entering the territory of the South African Republic in 1900, published the following proclamation:

"The troops of Queen Victoria are now passing through the Transvaal. Her Majesty does not make war on individuals, but is, on the contrary, anxious

<sup>1</sup> See below, § 254.

to spare them as far as may be possible the horrors of war. The quarrel England has is with the Government, not with the people, of the Transvaal. Provided they remain neutral, no attempt will be made to interfere with persons living near the line of march; every possible protection will be given them, and any of their property that it may be necessary to take will be paid for. But, on the other hand, those who are thus allowed to remain near the line of march must respect and maintain their neutrality, and the residents of any locality will be held responsible, both in their persons and property, if any damage is done to railway or telegraph, or any violence done to any member of the British forces in the vicinity of their home."

It must be emphasised that this position of private individuals of the hostile States renders it inevitable that commanders of armies which have occupied hostile territory should consider and mark as criminals all such private individuals of the enemy as commit hostile acts, although such individuals may act from patriotic motives and may be highly praised for their acts by their compatriots. The high-sounding and well-meant words of Baron Lambertmont, one of the Belgian delegates at the Conference of Brussels of 1874—"Il y a des choses qui se font à la guerre, qui se feront toujours, et que l'on doit bien accepter. Mais il s'agit ici de les convertir en lois, en prescriptions positives et internationales. Si les citoyens doivent être conduits au supplice pour avoir tenté de défendre leur pays au péril de leur vie, il ne faut pas qu'ils trouvent inscrits sur le poteau au pied duquel ils seront fusilés l'article d'un traité signé par leur propre gouvernement qui d'avance les condamne à mort"—have no *raison d'être* in face of the fact that

according to a generally recognised customary rule of International Law hostile acts on the part of private individuals are not acts of legitimate warfare, and the offenders can be treated and punished as war-criminals. Even those writers<sup>1</sup> who object to the term "criminals" do not deny that such hostile acts by private individuals, in contradistinction to hostile acts by members of the armed forces, may be severely punished. The controversy whether or not such acts may be styled "crimes" is again only one of terminology; materially the rule is not at all controverted.<sup>2</sup>

<sup>1</sup> See, for instance, Hall, § 18, p. 74, and Westlake, Chapters, p. 262.

<sup>2</sup> It is of value to quote articles 20-26 of the "Instructions for the Government of Armies of the United States in the Field," which the War Department of the United States published in 1863 during the War of Secession with the Southern member-States:

(20) "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civil existence that men live in political, continuous societies, forming organised units, called States or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war."

(21) "The citizen or native of a hostile country is thus an enemy as one of the constituents of the hostile State or nation, and as such is subjected to the hardships of war."

(22) "Nevertheless, as civilisation has advanced during the last centuries, so has likewise advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person,

property, and honour as much as the exigencies of war will admit."

(23) "Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."

(24) "The almost universal rule in remote times was . . . that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was . . . the exception."

(25) "In modern regular wars . . . protection of the inoffensive citizens of the hostile country is the rule; privation and disturbance of private relations are the exceptions."

(26) "Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious Government or rulers, and they may expel every one who declines to do so. But, whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives."

Belgium ???

War a  
contention  
between  
States for  
the purpose  
of overpowering  
each  
other.

§ 58. The last, and not the least important, characteristic of war is its purpose. It is a contention between States for the purpose of overpowering each other. This purpose of war is not to be confounded with the ends<sup>1</sup> of war, for, whatever the ends of war may be, they can only be realised by one belligerent overpowering the other. Such a defeat as compels the vanquished to comply with any demand the victor may choose to make is the purpose of war. Therefore war calls into existence the display of the greatest possible power and force on the part of the belligerents, rouses the passion of the nations in conflict to the highest possible degree, and endangers the welfare, the honour, and eventually the very existence of both belligerents. Nobody can predict with certainty the result of a war, however insignificant one side may seem to be. Every war is a risk and a venture. Every State which goes to war knows beforehand what is at stake, and it would never go to war were it not for its firm, though very often illusory, conviction of its superiority in strength over its opponent. Victory is necessary in order to overpower the enemy; and it is this necessity which justifies all the indescribable horrors of war, the enormous sacrifice of human life and health, and the unavoidable destruction of property and devastation of territory. Apart from special restrictions imposed by the Law of Nations upon belligerents, all kinds and all degrees of force may be, and eventually must be, made use of in war in the interest and under the compulsion of its purpose and in spite of their cruelty and the utter misery they entail. As war is a struggle for existence between States, no amount of individual suffering and misery can be regarded; the national existence and

<sup>1</sup> See below, § 66.

independence of the struggling State is a higher consideration than any individual well-being.

§ 59. The characteristics of war as developed Civil War. above must help to decide the question whether so-called civil wars are war in the technical meaning of the term. It has already been stated above (in § 56) that an armed contention between member-States of a Federal State and the latter and between a suzerain and its vassal ought to be considered as war because both parties are real States, although the Federal State as well as the suzerain may correctly designate it as a rebellion. Such armed contentions may be called civil wars in a wider sense of the term. In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large fraction of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States*, such a civil war need not be from the beginning, nor become at all, war in the technical sense of the term. But it may become war through the recognition of each of the contending parties or of the insurgents, as the case may be, as a belligerent Power.<sup>1</sup> Through this recognition a body of individuals receives in so far an international position as it is for some parts and in some points treated as though it were a subject<sup>2</sup> of International Law. Such recognition may be granted by the very State within the boundaries of which the civil war broke out, and then other States will likewise in most cases, although they need not, recognise a state of war as existing and bear the duties of neutrality. But it may happen that other States recognise insurgents as a belligerent

<sup>1</sup> See below, §§ 76 and 298.

<sup>2</sup> See above, Vol. I. § 63.



Power before the State on whose territory the insurrection broke out so recognises them. In such case the insurrection is war in the eyes of these other States, but not in the eyes of the legitimate Government.<sup>1</sup> Be that as it may, it must be specially observed that, although a civil war becomes war in the technical sense of the term by recognition, this recognition has a lasting effect only when the insurgents succeed in getting their independence established through the defeat of the legitimate Government and a consequent treaty of peace which recognises their independence. † Nothing, however, prevents the State concerned, after the defeat of the insurgents and reconquest of the territory which they had occupied, from treating them as rebels according to the Criminal Law of the land, for the character of a belligerent Power received through recognition is lost *ipso facto* by their defeat and the re-occupation by the legitimate Government of the territory occupied by them.

Guerilla  
War.

§ 60. The characteristics of war as developed above are also decisive for the answer to the question whether so-called guerilla war is real war in the technical sense of the term. Such guerilla war must not be confounded with guerilla tactics during a war. It happens during war that the commanders send small bodies of soldiers wearing their uniform to the rear of the enemy for the purpose of destroying bridges and railways, cutting off communications and supplies, attacking convoys, intercepting despatches, and the like. This is in every way legal, and the members of such bodies, when captured, enjoy the treatment due to enemy soldiers. It happens, further, that hitherto private individuals who did not

<sup>1</sup> See below, § 298. †

take part in the armed contention take up arms and devote themselves mainly to similar tactics. According to the former rules of International Law such individuals, when captured, under no condition enjoyed the treatment due to enemy soldiers, but could be treated as criminals and punished with death. According to article 1 of the Regulations adopted in 1899 by the Hague Conference, such guerilla fighters enjoy the treatment of soldiers under the four conditions that they (1) do not act individually, but form a body commanded by a person responsible for his subordinates, (2) have a fixed distinctive emblem recognisable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws of war.

On the other hand, one speaks of guerilla war or petty war when, after the defeat and the capture of the main part of the enemy forces, the occupation of the enemy territory, and the downfall of the enemy Government, the routed remnants of the defeated army carry on the contention by mere guerilla tactics. Although hopeless of success in the end, such petty war can go on for a long time, thus preventing the establishment of a state of peace in spite of the fact that regular war is over and the task of the army of occupation is no longer regular warfare. Now the question whether such guerilla war is real war in the strict sense of the term in International Law must, I think, be answered in the negative, for two reasons. First, there are no longer the forces of two States in the field, because the defeated belligerent State has ceased to exist through the military occupation of its territory, the downfall of its established Government, the capture of the main part and the routing of the remnant of its forces. And, secondly, there is no

longer a contention between armed forces in progress. For although the guerilla bands are still fighting when attacked, or when attacking small bodies of enemy soldiers, they try to avoid a pitched battle, and content themselves with the constant harassing of the victorious army, the destroying of bridges and railways, cutting off communications and supplies, attacking convoys, and the like, always in the hope that some event or events may occur which will induce the victorious army to withdraw from the conquered territory. But if guerilla war is not real war, it is obvious that in strict law the victor need no longer treat the guerilla bands as a belligerent Power and the captured members of those bands as soldiers. It is, however, not advisable that the victor should cease such treatment as long as those bands are under responsible commanders and observe themselves the laws and usages of war. For I can see no advantage or reason why, although in strict law it could be done, those bands should be treated as criminals. Such treatment would only call for acts of revenge on their part, without in the least accelerating the pacification of the country. And it is, after all, to be taken into consideration that these bands act not out of criminal but patriotic motives. With patience and firmness the victor will succeed in pacifying these bands without recourse to methods of harshness.

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## II

## CAUSES, KINDS, AND ENDS OF WAR

Grotius, I. c. 3; II. c. 1; III. c. 3—Pufendorf, VIII. c. 6, § 9—Vattel, III. §§ 2, 5, 24—50, 183—187—Lorimer, II. pp. 29—48—Phillimore, III. §§ 33—48—Twiss, II. §§ 26—30—Halleck, I. pp. 488—519—Taylor, §§ 452—454—Wheaton, §§ 295—296—Bluntschli, §§ 515—521—Heffter, § 113—Lueder in Holtzendorff, IV. pp. 221—236—Klüber, §§ 41, 235, 237—G. F. Martens, §§ 265—266—Ullmann, § 141—Bonfilis, Nos. 1002—1005—Pradier-Fodéré, VI. Nos. 2661—2670—Rivier, II. p. 219—Calvo, IV. §§ 1866—1896—Fichte, "Ueber den Begriff des wahren Krieger" (1815)—Rettich, "Zur Theorie und Geschichte des Rechts zum Kriege" (1888), pp. 141—292—Peyronnard, "Des causes de la guerre" (1901).

§ 61. Whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and the neutral States. This being the case, the question as to the causes of war is of minor importance for the Law of Nations, although not for international ethics. The matter need not be discussed at all in a treatise on International Law were it not for the fact that many writers maintain that there are rules of International Law in existence which determine and define just causes of war. It must, however, be emphasised that this is by no means the case. All such rules laid down by writers on International Law as recognise certain causes as just and others as unjust are rules of writers, but not rules of International Law based on international custom or international treaties.

Rules of  
Warfare  
independ-  
ent of  
Causes of  
War.

§ 62. The causes of war are innumerable. They are involved in the fact that the development of

Causes of  
War.

mankind is indissolubly connected with the national development of States. The millions of individuals who as a body are called mankind do not face one another individually and severally, but in groups as races, nations, and States. With the welfare of the races, nations, and States to which they belong the welfare of individuals is more or less identified. And it is the development of races, nations, and States that carries with it the causes of war. A constant increase of population must in the end enforce the necessity upon a State of acquiring more territory, and if such territory cannot be acquired by peaceable means, acquisition by conquest alone remains. At certain periods of history the principle of nationality and the desire for national unity gain such a power over the hearts and minds of the individuals belonging to the same race or nation, but living within the boundaries of several different States, that wars break out for the cause of national unity and independence. And jealous rivalry between two or more States, the awakening of national ambition, the craving for rich colonies, the desire of a land-locked State for a sea coast, the endeavour of a hitherto minor State to become a world-Power, the ambition of dynasties or of great politicians to extend and enlarge their influence beyond the boundaries of their own State, and innumerable other factors, have been at work as far back as history goes, and will probably be at work for all the future, to create causes of war.

Just  
Causes of  
War.

§ 63. Now it depends often largely upon the standpoint from which they are viewed whether or not causes of war are to be called just causes. A war may be just or unjust from the standpoint of both belligerents, or just from the standpoint of one and utterly unjust from the standpoint of the

other. The assertion that whereas all wars waged for political causes are unjust, all wars waged for international delinquencies are just, if there be no other way of getting reparation and satisfaction, is certainly incorrect in its generality. The evils of war are so great that, even when caused by an international delinquency,<sup>1</sup> war cannot be justified if the delinquency was comparatively unimportant and trifling. And, on the other hand, under certain circumstances and conditions many political causes of war may correctly be called just causes. Only such individuals as lack insight into history and human nature can, for instance, defend the opinion that a war is unjust which has been caused by the desire for national unity or by the desire to maintain the balance of power which is the basis of all International Law. The necessity of a war implies its justification, whatever may be the cause. In the past many wars have undoubtedly been waged which were unjust from whatever standpoint they may be viewed. But the number of wars diminishes gradually every year, and the majority of the European wars during the nineteenth century were wars that were, from the standpoint of at least one of the belligerents, necessary and therefore just wars.

§ 64. Be that as it may, causes of war must not be confounded with pretexts for war. A State which makes war against another will never confess that there is no just cause for war, and it will therefore, when it has made up its mind to make war for political reasons, always look out for a so-called just cause. Thus frequently the apparent reason of a war is only a pretext behind which the real cause is concealed. If two States are convinced that war between them is

Causes in  
contradistinction  
to Pre-  
texts for  
War.

<sup>1</sup> See above, Vol. I. §§ 151-156.

inevitable, and if consequently they face each other armed to the teeth, they will find at the suitable time many a so-called just cause plausible and calculated to serve as a pretext for the outbreak of the war which was planned and resolved upon long ago. The skill of politics and diplomacy are nowhere more needed than on the occasion of a State's conviction that it must go to war for one reason or another. Public opinion at home and abroad is often not ripe to appreciate the reason and not prepared for the scheme of the leading politicians, whose task it is to realise their plans with the aid of pretexts which appear as the cause of war, whereas the real cause does not become apparent for some time.

Different  
kinds of  
War.

§ 65. Such writers on International Law as lay great stress upon the causes of war in general and upon the distinction between just causes and others, lay also great stress upon the distinction between different kinds of war. But as the rules of the Law of Nations are the same<sup>1</sup> for the different kinds of war that may be distinguished, this distinction is in most cases of no importance. Apart from that, there is no unanimity respecting the kinds of war, and it is apparent that, just as the causes of war are innumerable, so innumerable kinds of war can be distinguished. Thus one speaks of offensive and defensive, of religious, political, dynastic, national, civil wars; of wars of unity, independence, conquest, intervention, revenge, and of many other kinds. As the very name which each different kind of war bears explains always its character, no further details are necessary respecting kinds of war.

Ends of  
War.

§ 66. The cause or causes of a war determine at its inception the ends of such war. The ends of war

<sup>1</sup> See above, § 61.

must not be confounded with the purpose of war.<sup>1</sup> Whereas the purpose of war is always the same—namely, the overpowering and utter defeat of the opponent—the ends of war may be different in each case. Ends of war are those objects for the realisation of which a war is made.<sup>2</sup> In the beginning of the war its ends are determined by its cause or causes, as already said. But these ends may undergo an alteration, or at least a modification, with the progress and the development of the war. No moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made. If war has once broken out the very national existence of the belligerents is more or less at stake. The risk the belligerents run, the exertion they make, the blood and wealth they sacrifice, the reputation they gain or lose through the changing fortune and chances of war—all these and many other factors work or may work together to influence the ends of a war so that eventually there is scarcely any longer a relation between them and the causes of the war. If war really were, as some writers maintain,<sup>3</sup> the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, no such alteration of the ends of war could take place without setting at once in the wrong such belligerent as changes the ends for which the war was initiated. But history shows that nothing of the kind is really the case, and the rules of International Law by no means forbid such alteration or modification of the ends of a war. This alteration or modification of the ends is the result of

<sup>1</sup> Ends of war must likewise not be confounded with aims of land and sea warfare; see below, §§ 103 and 173.

<sup>2</sup> See Bluntschli, § 536; Lueder in Holtzendorff, IV. p. 364; Rivier, II. p. 219.

<sup>3</sup> See above, § 54.



an alteration or modification of circumstances created during the progress of war through the factors previously mentioned ; it could not be otherwise, and there is no moral, legal, or political reason why it should be otherwise. And the natural jealousy between the members of the Family of Nations, their conflicting interests in many points, and the necessity of a balance of power, are factors of sufficient strength to check the dangers which such alteration of the ends of a war may eventually involve.

### III

#### THE LAWS OF WAR

Hall, § 17—Westlake, Chapters, pp. 232-235—Maine, pp. 122-159—Phillimore, III. § 50—Taylor, § 470—Walker, History, I. §§ 106-108—Heffter, § 119—Lueder in Holtzendorff, IV. pp. 253-333—Ullmann, §§ 142 and 144—Bonfil, Nos. 1006-1012—Rivier, II. pp. 238-242—Calvo, IV. §§ 1897-1898—Fiore, III. Nos. 1244-1260—Martens, II. § 107—Longuet, p. 12—Kriegsgebrauch, p. 2—Holland, Studies, pp. 40-96.

Origin of  
the Laws  
of War.

§ 67. Laws of War are the rules of the Law of Nations respecting warfare. The roots of the present Laws of War are to be traced back to practices of belligerents which arose and grew gradually during the latter part of the Middle Ages. The unsparing cruelty of the war practices during the greater part of the Middle Ages began gradually to be modified through the influence of Christianity and chivalry. And although these practices were cruel enough during the fifteenth, sixteenth, and seventeenth centuries, they were mild compared with those of still earlier times. A decided progress was made during the eighteenth, and again during the nineteenth century after the close of the Napoleonic wars, especially in the time

from 1850 to 1900. The laws of war evolved in this way: isolated milder practices became by-and-by usages, so-called *usus in bello*, manner of warfare, *Kriegs-Manier*, and these usages through custom and treaties turned into legal rules. And this evolution is constantly going on, for, besides the recognised Laws of War, there are usages in existence which have a tendency to become gradually legal rules of warfare. The whole growth of the laws and usages of war is determined by three principles. There is, first, the principle that a belligerent should be justified in applying any amount and any kind of force which is necessary for the realisation of the purpose of war—namely, the overpowering of the opponent. There is, secondly, the principle of humanity at work, which says that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to a belligerent. And, thirdly and lastly, there is at work the principle of chivalry which arose in the Middle Ages and introduced a certain amount of fairness in offence and defence, and a certain mutual respect. And, in contradistinction to the savage cruelty of former times, belligerents have in modern times come to the conviction that the realisation of the purpose of war is in no way hampered by indulgence shown to the wounded, the prisoners, and the private individuals who do not take part in the fighting. Thus the influence of the principle of humanity has been and is still enormous upon the practice of warfare. And the methods of warfare, although by the nature of war to a certain degree cruel and unsparing, become less cruel and more humane every day. But it must be emphasised that the whole evolution of the laws and usages of war could not have taken place but for the

institution of standing armies, which dates from the fifteenth century. The humanising of the practices of war would have been impossible without the discipline of standing armies; and the important distinction between members of armed forces and private individuals could not have arisen without the existence of standing armies.

The latest  
Develop-  
ment of  
the Laws  
of War.

§ 68. The second part of the nineteenth century has produced the latest and the most important development of the Laws of War through general treaties between the majority of States.

The first treaty of that kind was the Declaration of Paris of April 16, 1856, respecting warfare on sea. It abolishes privateering, recognises the principles that the neutral flag covers enemy goods and that neutral goods under an enemy flag cannot be seized, and enacts the rule that a blockade in order to be binding must be effective.

The next treaty was the Geneva Convention of August 22, 1864, for the amelioration of the condition of the wounded soldiers in armies in the field, and now joined by nearly all the civilised States. The Hague Conference of 1899 has agreed upon a Convention for the adaptation of the principles of the Geneva Convention to maritime warfare.

The third treaty was the Declaration of St. Petersburg of December 11, 1868, respecting the prohibition of the use in war of explosive balls under a certain weight.

The fourth and last treaty was the Convention enacting the "Regulations respecting the Laws and Customs of War on Land" agreed upon at the Hague Conference in 1899. The history of this Convention may be traced back to the "Instructions for the Government of Armies of the United States in the Field" which the United States published on April 14,

1863, during the War of Secession. These instructions, which were drafted by Professor Francis Lieber, of the Columbia College of New York, represent the first endeavour to codify the Laws of War, and they are even nowadays of great value and importance. In 1874 an International Conference, invited by the Emperor Alexander II. of Russia, met at Brussels for the purpose of discussing a draft code of the Laws of War on land as prepared by Russia. The body of the articles agreed upon at this Conference, and known as the "Brussels Declarations," have, however, never become law, as ratification was never given by the Powers. But the Brussels Declarations were made the basis of deliberations on the part of the Institute of International Law, which at its meeting at Oxford in 1880 adopted a Manual<sup>1</sup> of the Laws of War consisting of a body of 86 Rules under the title "*Les Lois de la Guerre sur Terre*," and a copy of this draft code was sent to all the Governments of Europe and America. It was, however, not until the Hague Peace Conference of 1899 that the Powers reassembled to discuss again the codification of the Laws of War. At this Conference the Brussels Declarations were taken as the basis of the deliberations; but although the bulk of its articles was taken over, several important modifications were introduced in the Convention, which was finally agreed upon and ratified, only a few Powers abstaining from ratification. The Convention,<sup>2</sup> as the

<sup>1</sup> See *Annuaire*, V. pp. 157-174.

<sup>2</sup> For brevity's sake the Hague Convention enacting Regulations regarding the laws and customs of war on land will be referred to in the following pages as the *Hague Regulations*. It is, however, of importance to observe that the Hague Regulations, although they

are intended to be binding upon the belligerents, are only the basis upon which the signatory Powers have to frame instructions for their forces. Article 1 declares: "The high contracting parties shall issue instructions to their armed land forces, which shall be in conformity with the Regulations respecting

preamble expressly states, does not aim at giving a complete code of the Laws of War on land, and cases beyond its scope still remain the subject of customary rules and usages. Further, it does not create universal International Law, as article 2 of the Convention expressly stipulates that the Regulations shall be binding upon the contracting Powers only in case of war between two or more of them, and shall cease to be binding in case a non-contracting Power takes part in the war. But, in spite of this express stipulation, there can be no doubt that in time the Regulations will become universal International Law. For all the great Powers and the greater number of the smaller Powers are already parties to the Convention, and others will certainly become parties later on; and even if a few should never join, the moral force of the Regulations is so overpowering that practically all belligerents will carry them out, just as the Declaration of Paris of 1856 is practically observed by all the Powers, although several of them have not joined.<sup>1</sup>

Binding  
force of  
the Laws  
of War.

§ 69. As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals<sup>2</sup> as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects.

the Laws of War on land annexed to the present Convention." The British War Office, therefore, on November 28, 1903, published a Handbook, drafted by Professor Holland, for the information of the British forces, comprising "The Laws and Customs of War on Land, as defined by the Hague Convention of 1899." This excellent little book presents a model of precision and clearness.

<sup>1</sup> The United States of America

(see above, Vol. I. § 32), published on June 27, 1900, a body of rules for the use of her navy under the title "The Laws and Usages of War on Sea"—the so-called "United States Naval War Code." This code, although withdrawn on February 4, 1904, will undoubtedly be the starting-point of a movement for a Naval War Code to be generally agreed upon by the Powers. See below, § 179.

<sup>2</sup> See below, § 248.

In accordance with the German proverb, *Kriegsraison geht vor Kriegsrecht* (*necessity in war overrules the manner of warfare*), many German authors<sup>1</sup> and the Swiss-Belgian Rivier<sup>2</sup> maintain that the laws of war lose their binding force in case of extreme necessity. Such case of extreme necessity is said to have arisen when violation of the laws of war alone offers a means of escape from extreme danger or of the realisation of the purpose of war—namely, the overpowering of the opponent. This alleged exception to the binding force of the Laws of War is, however, not at all generally accepted by German writers, as, for instance, Bluntschli does not mention it. English, American, French, and Italian writers do not, as far as I can see, acknowledge it. The protest of Professor Westlake<sup>3</sup> against such an exception is, therefore, the more justified, as a great danger would be involved in it. That necessity plays as great a part in war as elsewhere cannot be denied. The fact is that many legal rules of warfare are so framed that they do not apply to a case of necessity; but there are, on the other hand, many rules which know nothing of any exception in case of necessity. Thus, for instance, the rules that poison and poisoned arms are forbidden, and that it is not allowed treacherously to kill or wound individuals belonging to the hostile army, do not lose their binding force even if the escape from extreme danger or the realisation of the purpose of war would depend upon an act of such kind. It may, however, correctly be maintained that all mere usages, in contradistinction to laws, of war may be ignored in case of necessity.

<sup>1</sup> See Lueder in Holtzendorff, IV. pp. 254-257; Ullmann, § 144; Liezt, § 39, IV. 3.] ;

<sup>2</sup> II. p. 242.

<sup>3</sup> See Westlake, Chapters, p. 238.

## IV

## THE REGION OF WAR

Taylor, §§ 471 and 498—Heffter, § 118—Lueder in Holtzendorff, IV. pp. 362-364—Klüber, § 242—Liszt, § 40, I.—Ullmann, § 159—Pradier-Fodéré, VI. No. 2733—Rivier, II. pp. 216-219—Boeck, Nos. 214-230—Longuet, §§ 18-25—Perels, § 33—Rettich, "Zur Theorie und Geschichte des Rechts zum Kriege" (1888), pp. 174-213.

Region of War in contradistinction to Theatre of War.

§ 70. Region of war is that part of the surface of the earth in which the belligerents can prepare and execute hostilities against each other. In this meaning region of war ought<sup>1</sup> to be distinguished from theatre of war. The latter is that part of a territory or the Open Sea on which hostilities actually take place. Legally no part of the earth which is not region of war can be made the theatre of war, but not every section of the whole region of war is necessarily theatre of war. Thus, in the last war between England and the two South African Republics the whole of the territory of the British Empire and the Open Sea, as well as the territory of the Republics, was the region of war, but the theatre of war was only in South Africa. On the other hand, in a war between England and another great naval Power it might well happen that the region of war is in many of its sections made the theatre of war.

Particular Region of every War.

§ 71. The region of war depends upon the belligerents, so that every war has its particular region, at least as far as the territorial region is concerned. And that region is the whole of the territories of the belligerents together with the Open Sea<sup>2</sup> as far as parts of either are not neutralised.<sup>3</sup> Since colonies are a

<sup>1</sup> This distinction, although of considerable importance, does not hitherto appear to have been made by any publicist.

<sup>2</sup> See above, Vol. I. § 256.

<sup>3</sup> See below, § 72.

part of the territory of the mother country, they fall within the region of war in case of a war between the mother country and another State, whatever their position may be within the colonial empire they belong to. Thus in a war between Great Britain and France the whole of Australia, of Canada, of India, and so on, would be included with the British Islands as region of war. And, further, as States under the suzerainty of another State are internationally in several respects considered to be a portion of the latter's territory,<sup>1</sup> they fall within the region of war in case of war between the suzerain and another Power. Again, such parts of the territory of a State as are under the *condominium* or under the administration of another State<sup>2</sup> fall within the region of war in case of a war between one of the *condomini* and another Power and in case of war between the administering and another State. Thus, in a war between Great Britain and Austria-Hungary, Cyprus, as well as Bosnia and Herzegovina, would fall within the region of war. And the Soudan, which is in the *condominium* of England and Egypt, would fall within the region of war in case of a war between England and another State. But neither Cyprus nor Bosnia and Herzegovina would fall within the region of war in case of a war between Turkey and another Power, Great Britain and Austria-Hungary respectively excepted.

That neutral territory is outside the region of war is a matter of course. But there are cases possible in which a part or the whole of the territory of a neutral State falls within the region of war. Such cases arise in wars in which such neutral territories are the very objects of the war, as Korea and the

<sup>1</sup> See above, Vol. I. §§ 91 and 169.

<sup>2</sup> See above, Vol. I. § 171.



Chinese province of Manchuria<sup>1</sup> were in the Russo-Japanese War of 1904 and 1905.

Exclusion  
from  
region of  
war  
through  
neutrali-  
sation.

§ 72. Although regularly the Open Sea in its whole extent and the whole of the territories of the belligerents are the region of war, certain parts may be excluded through neutralisation. Such neutralisation can take place permanently through a general treaty of the Powers or temporarily through a special treaty of the belligerents. At present no part of the Open Sea is neutralised, as the neutralisation of the Black Sea was abolished<sup>2</sup> in 1871. But the following are some important instances<sup>3</sup> of permanent neutralisation of parts of territories:—

(1) The former Sardinian and since 1860 (see above, Vol. I. § 207) French provinces of Chablais and Faucigny are permanently neutralised through article 92 of the Act of the Vienna Congress, 1815.

(2) The Ionian Islands through article 2 of the Treaty of London of November 14, 1863, are permanently neutralised since they merged in the kingdom of Greece. But this neutralisation was restricted to the islands of Corfu and Paxo only by article 2 of the treaty of London of March 24, 1864. (See Martens, N.B.G., XVIII. p. 63.)

(3) The Suez Canal is permanently neutralised since 1888. (See above, Vol. I. § 183.)

(4) The Straits of Magellan are permanently neutralised through article 5 of the boundary treaty of Buenos Ayres of July 23, 1881. But this treaty is not a general treaty of the Powers, since it is concluded between Argentina and Chile only. (See

<sup>1</sup> See below, § 320.

<sup>2</sup> See above, Vol. I. §§ 181–256.

<sup>3</sup> The matter is thoroughly treated in Rettich, *Zur Theorie und Geschichte des Rechtes zum*

*Kriege* (1888), pp. 174–213, where also the neutralisation of some so-called international rivers, especially the Danube, Congo, and Niger, is discussed.

Martens, N.R.G., 2nd ser. XII. p. 491, and above, Vol. I. § 195, p. 250, note 2, and § 568, p. 568, note 2.)

(5) The Panama Canal, which is being built by the United States of America, is permanently neutralised through article 3 of the Hay-Pauncefote treaty of November 18, 1901. But this treaty is not a general treaty of the Powers either, being concluded between Great Britain and the United States only.

It is, further, possible for parts of the territories of belligerents and certain parts of the Open Sea to become neutralised through a treaty of the belligerents for the time of a particular war only. Thus, when in 1870 war broke out between France and Germany, the commander of the French man-of-war<sup>1</sup> "Dupleix" arranged with the commander of the German man-of-war "Hertha"—both stationed in the Japanese and Chinese waters—that they should, through their embassies in Yokohama, propose to their respective Governments the neutralisation of the Japanese and Chinese waters for the time of the war. Germany consented, but France refused the neutralisation.

§ 73. That there is at present no part of the Open Sea neutralised is universally recognised, and this applies to the Baltic Sea, which is admittedly part of the Open Sea. Some writers,<sup>2</sup> however, maintain that the riparian States of the Baltic have a right to forbid all hostilities within the Baltic in case of a war between other States than themselves, and could thereby neutralise the Baltic without the consent and even against the will of the belligerents. This opinion is based on the fact that during the eighteenth century the riparian States of the Baltic claimed that right in several conventions, but it appears untenable, because

Asserted  
exclusion  
of the  
Baltic  
Sea from  
the Region  
of War.

<sup>1</sup> See Perels, § 33, p. 160, note 2. length and answers it in the affirmative.

<sup>2</sup> See Perels, pp. 160-163, who discusses the question at some

it is opposed to the universally recognised principle of the freedom of the Open Sea. As no State has territorial supremacy over parts of the Open Sea, I cannot see how such a right of the riparian States of the Baltic could be justified.<sup>1</sup>

## V

## THE BELLIGERENTS

Vattel, III. § 4—Phillimore, III. §§ 92-93—Taylor, §§ 458-460—Wheaton, § 294—Bluntschli, §§ 511-514—Heffter, §§ 114-117—Lueder in Holtzendorff, IV. pp. 237-248—Klüber, § 236—G. F. Martens, II. § 264—Gareis, § 83—Liszt, § 39, II.—Ullmann, § 143—Pradier-Fodéré, VI. Nos. 2656-2660—Rivier, II. pp. 207-216—Calvo, IV. §§ 2004-2038—Martens, II. § 108—Heilborn, System, pp. 333-335.

Qualifica-  
tion of a  
Belli-  
gerent  
(*facultas  
bellandi*).

§ 74. As the Law of Nations recognises the status of war and its effects as regards rights and duties between the two or more belligerents on the one hand, and on the other between the belligerents and neutral States, the question arises what kind of States are legally qualified to make war and to become thereby belligerents. Publicists who discuss this question at all speak mostly of a *right* of States to make war, a *jus belli*. But if this so-called right is examined, it turns out to be no right at all, as there is no corresponding duty in those against whom the right exists.<sup>2</sup> A State which makes war against another exercises one of its natural functions, and the only question is whether such State is or is not legally qualified to exercise such function. Now, according to the Law of Nations full-Sovereign States alone possess the legal qualification to become

<sup>1</sup> See Rivier, II. p. 218; Bonfilis, § 504; Nys, I. pp. 448-450.

<sup>2</sup> See Heilborn, System, p. 333.

belligerents; half- and part-Sovereign States are not legally qualified to become belligerents. Since neutralised States, as Switzerland, Belgium, and Luxemburg, are full-Sovereign States, they are legally qualified to become belligerents, although their neutralisation binds them not to make use of their qualification except for defence. If they become belligerents because they are attacked, they do not lose their character as neutralised States, but if they become belligerents for offensive purposes they *ipso facto* lose this character.

§ 75. Such States as do not possess the legal qualification to become belligerents are by law prohibited from offensive or defensive warfare. But the possession of armed forces makes it possible for them in fact to enter into war and to become belligerents. History records instances enough of such States having actually made war. Thus in 1876 Servia and Montenegro, although at that time vassal States under Turkish suzerainty, declared war against Turkey, and in March 1877 peace was concluded between Turkey and Servia.<sup>1</sup> And when in April 1877 war broke out between Russia and Turkey, the then Turkish vassal State Roumania joined Russia, and Servia declared war anew against Turkey in December 1877. Further, in November 1885 a war was waged between Servia, which had become a full-Sovereign State, and Bulgaria, the vassal State under Turkish suzerainty. The war lasted actually only a fortnight, but the formal treaty of peace was not signed before March 3, 1886, at Bukarest.<sup>2</sup> And although Turkey is a party to this treaty Bulgaria appears thereto independently and on its own behalf.

Possibility  
in contra-  
distinc-  
tion to  
qualifica-  
tion to  
become a  
Belli-  
gerent.

<sup>1</sup> See Martens, N.R.G., 2nd ser. IV. pp. 12, 14, 172.

<sup>2</sup> See Martens, N.R.G., 2nd ser. IV. p. 284.

Whenever a case arises in which a State lacking the legal qualification to make war nevertheless actually makes war, such State is a belligerent, the contention is real war, and all the rules of International Law respecting warfare apply to it.<sup>1</sup> Therefore, an armed contention between the suzerain and the vassal, between a full-Sovereign State and a vassal State under the suzerainty of another State, and, lastly, between a Federal State and one or more of its members, is war<sup>2</sup> in the technical sense of the Law of Nations.

Insurgents as a Belligerent Power.

§ 76. The distinction between legal qualification and actual power to make war explains the fact that insurgents may become a belligerent Power. It is a customary rule of the Law of Nations that any State can recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war.<sup>3</sup> Such insurgents in fact, although not in law, form a State-like community, and practically they are making war, although their contention is by International Law not considered as war in the technical sense of the term as long as they have not received recognition as a belligerent Power.

Principal and accessory Belligerent Parties.

§ 77. War occurs usually between two States, one

<sup>1</sup> This becomes quite apparent through the fact that Bulgaria has by accession become a party to the Geneva Convention.

<sup>2</sup> See above, § 56, and Baty, *International Law in South Africa* (1900), pp. 66-68.

<sup>3</sup> See above, § 59. See also Rougier, *Les guerres civiles*, &c. (1903), pp. 372-447, and Westlake,

I. pp. 50-57. The Institute of International Law, at its meeting at Neuchâtel in 1900, adopted a body of nine articles concerning the rights and duties of foreign States in case of an insurrection; articles 4-9 deal with the recognition of the belligerency of insurgents. (See *Annuaire*, XVII. p. 227.)

belligerent party being on each side. But there are cases in which there are on one or on both sides several parties, and in some of such cases principal and accessory belligerent parties are to be distinguished.

Principal belligerent parties are those parties to a war who wage it on the basis of a treaty of alliance, whether such treaty was concluded before or during the war. On the other hand, accessory belligerent parties are such States as provide help and succour only in a limited way to a principal belligerent party at war with another State; for instance, by paying subsidies, sending a certain number of troops or men-of-war to take part in the contention, granting a coaling station to the men-of-war of the principal party, allowing the latter's troops a passage through their territory, and the like. Such accessory party becomes a belligerent through rendering help.

The matter need hardly be mentioned at all were it not for the fact that the question is discussed by the publicists whether or not it involves a violation of neutrality on the part of a neutral State in case it fulfils in time of war a treaty concluded in time of peace, by the terms of which it has to grant a coaling station, the passage of troops through its territory, and the like, to one of the belligerents. This question is identical with the question, to be treated below in § 305, whether a qualified neutrality, in contradistinction to a perfect neutrality, is admissible. Since the answer to this question is in the negative, such State as fulfils a treaty obligation of this kind in time of war may be considered an accessory belligerent party to the war by the other side.

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## VI

## THE ARMED FORCES OF THE BELLIGERENTS

Vattel, III. §§ 223-231—Hall, §§ 177-179, 181—Lawrence, §§ 218-224—Manning, pp. 206-210—Phillimore, III. § 94—Twiss, II. § 45—Halleck, I. pp. 555-562—Taylor, §§ 471-476—Wheaton, §§ 356-358—Bluntschli, §§ 569-572—Heffter, §§ 124-124A—Lueder in Holtzendorff, IV. pp. 371-385—Klüber, 267—G. F. Martens, II. § 271—Garcia, § 83—Ullmann, § 148—Bonfile, Nos. 1088-1098—Despagnet, Nos. 524-527—Pradier-Fodéré, VI. Nos. 2721-2732—Rivier, II. pp. 242-259—Calvo, IV. §§ 2044-2065—Fiore, III. Nos. 1303-1316—Martens, II. § 112—Longuet, §§ 26-36—Mérignhac, pp. 67-84—Pillet, pp. 35-59—Kriegsgebrauch, pp. 4-8—Perals, § 34—Boeck, Nos. 209-213—Dupuis, Nos. 74-91—Lawrence, War, pp. 195-218.

Regular  
Armies  
and  
Navies.

§ 78. The chief part of the armed forces of the belligerents are their regular armies and navies. What kinds of troops constitute a regular army and a regular navy is not for International Law to determine, but a matter of Municipal Law exclusively. Whether or not the so-called Militia and Volunteer corps belong to an army rests entirely with the Municipal Law of the belligerents. There are several States whose armies consist of Militia and Volunteer Corps exclusively, no standing army being provided for. The Hague Regulations stipulate expressly in their article 1 that in countries where Militia or Volunteer Corps constitute the army or form part of it they are included under the denomination "Army." It is likewise irrelevant to consider the composition of a regular army, whether it is based on conscription or not, whether natives only or foreigners also are enrolled, and the like.

Non-com-  
batant  
Members  
of Armed  
Forces.

§ 79. In the main, armed forces consist of combatants, but no army in the field consists of combatants exclusively, as there are always several kinds of other individuals with it, such as couriers, aeronauts,

doctors, farriers, veterinary surgeons, chaplains, nurses, official and voluntary ambulance men, contractors, canteen-caterers, newspaper correspondents, civil servants and diplomatists in the suite of the Commander-in-Chief.

Writers on the Law of Nations do not agree as regards the position of such individuals; they are not mere private individuals, but, on the other hand, are certainly not combatants, although they may—as, for instance, couriers, doctors, farriers, and veterinary surgeons—have the character of soldiers. They may correctly be said to belong *indirectly* to the armed forces. Article 3 of the Hague Regulations expressly stipulates that the armed forces of the belligerents may consist of combatants and non-combatants, and that both in case of capture must be treated as prisoners of war. However, when one speaks of armed forces, generally combatants only are in consideration.

§ 80. Very often the armed forces of belligerents consist throughout the war of their regular armies only, but, on the other hand, it happens frequently that irregular forces take part in the war. Of such irregular forces there are two different kinds to be distinguished—first, such as are authorised by the belligerents; and, secondly, such as are acting on their own initiative and their own account without special authorisation. Formerly it was a recognised rule of International Law that only the members of authorised irregular forces enjoyed the privileges due to the members of the armed forces of belligerents, whereas members of unauthorised irregular forces were considered to be war criminals and could be shot when captured. During the Franco-German war in 1870 the Germans acted throughout according

Irregular  
Forces.



to this rule with regard to the so-called "Franc-tireurs," requesting the production of a special authorisation of the French Government from every irregular combatant they captured, failing which he was shot. But according to article 1 of the Hague Regulations this rule is now obsolete, and its place is taken by the rule that irregulars enjoy the privileges due to members of the armed forces of the belligerents, although they do not act under authorisation, provided (1) that they are commanded by a person responsible for his subordinates, (2) that they have a fixed distinctive emblem recognisable at a distance, (3) that they carry arms openly, and (4) that they conduct their operations in accordance with the laws and customs of war. It must, however, be emphasised that this rule applies only to irregulars fighting in bodies, however small. Such individuals as take up arms or commit hostile acts singly and severally are still liable to be treated as war criminals, and shot.<sup>1</sup>

Levies *en*  
*masse*.

§ 81. It sometimes happens during war that on the approach of the enemy a belligerent calls the whole population of the country to arms and thus makes them a part, although a more or less irregular part, of his armed forces. Provided they receive some organisation and comply with the laws and usages of war, the combatants who take part in such a levy *en masse* organised by the State enjoy the privileges due to members of armed forces.

It sometimes happens, further, during wars, that a levy *en masse* takes place spontaneously without organisation by a belligerent, and the question arises whether or not those who take part in such levies *en masse* belong to the armed forces of the belligerents, and enjoy therefore the privileges due to members

<sup>1</sup> See below, § 254.

of such forces. Article 2 of the Hague Regulations stipulates that the population of a territory not yet occupied who, on the enemy's approach, spontaneously take up arms to resist the invading enemy, without having time to organise themselves under responsible commanders and to procure fixed distinctive emblems recognisable at a distance, shall nevertheless enjoy the privileges due to armed forces, provided that they act otherwise in conformity with the laws and usages of war. But this case is totally different from a levy *en masse* by the population of a territory already occupied by the enemy, for the purpose of freeing the country from the invader. The quoted stipulation of the Hague Regulations does not cover this case, in which, therefore, the old customary rule of International Law is valid, that those taking part in such a levy *en masse*, if captured, are liable to be shot.<sup>1</sup>

§ 82. As International Law grew up amongst the States of Christendom, and as the circle of the members of the Family of Nations includes only civilised, although not necessarily Christian, States, all writers on International Law agree that in wars between themselves the members of the Family of Nations should not make use of barbarous forces—that is, troops consisting of individuals belonging to savage tribes and barbarous races. But it can hardly be maintained that a rule of this kind has grown up in practice, nor has it been stipulated by treaties, the

Barbarous  
Forces.

<sup>1</sup> See below, § 254. Article 85 of the American Instructions for the Government of Armies in the Field of 1863 has enacted this rule as follows: "War rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or

against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled Government or not. . . ."

Hague Regulations overlooking this point. This being the fact, it is difficult to say whether the members of such barbarous forces, if employed in a war between members of the Family of Nations, would enjoy the privileges due to members of armed forces generally. I see no reason why they should not, provided such barbarous forces would or could comply with the laws and usages of war prevalent according to International Law. But the very fact that they are barbarians makes it probable that they could or would not do so, and then it would be unreasonable to grant them the privileges generally due to members of armed forces, and it would be necessary to treat them according to discretion. But it must be specially observed that the employment of barbarous forces must not be confounded with the enrolling of coloured individuals into the regular army and the employment of regiments consisting of disciplined coloured soldiers. There is no reason whatever why, for instance, the members of a regiment eventually formed by the United States of America out of negroes bred and educated in America, or why members of Indian regiments under English commanders, if employed in wars between members of the Family of Nations, should not enjoy the privileges due to the members of armed forces according to International Law.

Privateers.

§ 83. Formerly privateers were a generally recognised part of the armed forces of the belligerents, private vessels being commissioned through Letters of Marque by the belligerents to carry on hostilities at sea, and particularly to capture enemy merchantmen.<sup>1</sup> From the fifteenth century, when privateering

<sup>1</sup> See Martens, *Essai concernant les armateurs, les prises, et surtout les reprises* (1795).

began to grow up, down to the eighteenth century, belligerents used to grant such Letters of Marque to private ships owned by their subjects and by the subjects of neutral States. But during the eighteenth century the practice grew up that the belligerents granted Letters of Marque to private ships of their own subjects only.<sup>1</sup> However, privateering was abolished by the Declaration of Paris in 1856 as between the signatory Powers and others who joined it later on. And although privateering would still be legal as between other Powers, it will in future scarcely be made use of. In all the wars that occurred after 1856 between such Powers, Letters of Marque were not granted to private ships.<sup>2</sup>

§ 84. A case which happened in 1870, soon after the outbreak of the Franco-German war, gave occasion for the question whether a volunteer fleet could be considered a part of the armed naval forces of a belligerent. As the North-German Confederation owned only a few men-of-war, the creation of a volunteer fleet was intended. The King of Prussia, as President of the Confederation, invited the owners of private German vessels to make them a part of the German navy under the following conditions: Every

Volunteer  
Fleet.

<sup>1</sup> Many publicists maintain that nowadays a privateer commissioned by another State than that of which he is a subject is liable to be treated as a pirate when captured. With this, however, I cannot agree; see above, Vol. I. § 273, Hall, § 81, and below, § 330.

<sup>2</sup> See below, § 177. It is confidently to be hoped that the great progress made by the abolition of privateering through the Declaration of Paris will never be undone. But it is of importance to note the fact that up to the present day

endeavours have been made on the part of free-lances to win public opinion for a retrograde step. See, for instance, Gibson Bowles, *The Declaration of Paris of 1856* (1900); see also Perels, pp. 177-179. The Declaration of Paris being a law-making treaty which does not provide the right of the single signatory Powers to give notice of withdrawal, a signatory Power is not at liberty to give such notice, although Mr. Gibson Bowles (l. c. pp. 169-179) asserts that this could be done. See above, Vol. I. § 12.

ship should be assessed as to her value, and 10 per cent. of such value should at once be paid in cash to the owner as a price for the charter of the ship. The owner should engage the crew himself, but the latter should become for the time of the war members of the German navy, wear the German naval uniform, and the ship should sail under the German war flag and be armed and adapted for her purpose by the German naval authorities. Should the ship be captured or destroyed by the enemy, the assessed value should be paid to her owners in full ; but should it be restored after the war undamaged, the owner should retain the 10 per cent. received as charter price. All such vessels should only try to capture or destroy French men-of-war, and if successful the owner should receive a price between 1,500*l.* and 7,500*l.* as premium. The French Government considered this scheme a disguised evasion of the Declaration of Paris which abolished privateering, and requested the intervention of Great Britain. The British Government brought the case before the Law Officers of the Crown, who declared the German scheme to be substantially different from the revival of privateering, and consequently the British Government refused to object to it. The scheme, however, was never put into practice.<sup>1</sup>

Now the writers on International Law differ, in spite of the opinion of the British Law Officers, as to the legality of the above scheme ; but, on the other hand, they are unanimous that not every scheme for a voluntary fleet is to be rejected. Russia,<sup>2</sup> in fact, since 1877, has possessed a voluntary fleet. France<sup>3</sup> has

<sup>1</sup> See Perels, § 34 ; Hall, § 182 ; Lawrence, § 224 ; Boeck, No. 211 ; Dupuis, Nos. 81-84.

<sup>2</sup> See Dupuis, No. 85.

<sup>3</sup> See Dupuis, No. 86.

made arrangements with certain steamship companies according to which their mail-boats have to be constructed on plans approved by the Government, have to be commanded by officers of the French navy, and have to be incorporated in the French navy at the outbreak of war. Great Britain has entered from 1887 onwards into agreements with several powerful British steamship companies for the purpose of securing their vessels at the outbreak of hostilities, and the United States of America in 1892 made similar arrangements with the American Line.<sup>1</sup> But it must be specially observed that a proper commission must be given to each vessel belonging to a volunteer fleet and the like, and that such vessels cannot alternately claim the character of belligerent men-of-war and of merchantmen.

A remarkable case of this kind is that of the "Peterburg" and the "Smolensk," which occurred during the Russo-Japanese war.<sup>2</sup> On July 4 and 6, 1904, these vessels, which belonged to the Russian volunteer fleet in the Black Sea, were allowed to pass the Bosphorus and the Dardanelles, which are closed<sup>3</sup> to men-of-war of all nations, because they were flying the Russian commercial flag. They likewise passed the Suez Canal under their commercial flag, but after leaving Suez they converted themselves into men-of-war by hoisting the Russian war flag, and began to exercise over neutral merchantmen all rights of supervision which belligerents can claim for their cruisers in time of war. On July 13 the "Peterburg" captured the British P. & O. steamer "Malacca" for alleged carriage of contraband, and put a prize-

<sup>1</sup> See Lawrence, § 224, and these vessels in Lawrence, War, Dupuis, Nos. 87-88. pp. 205 *seq.*

<sup>2</sup> See the details of the career of <sup>3</sup> See above, Vol. I. § 197.

crew on board for the purpose of navigating her to Libau. But the British Government protested; the "Malacca" was released at Algiers on her way to Libau on July 27, and Russia agreed that the "Peterburg" and the "Smolensk" should no longer act as cruisers, and that all neutral vessels captured by them should be released.

The Crews  
of Mer-  
chantmen.

§ 85. In a sense the crews of merchantmen owned by subjects of the belligerents belong to the latter's armed forces. For those vessels are liable to be seized by enemy men-of-war, and if attacked for that purpose they can defend themselves, can return the attack, and eventually seize the attacking men-of-war. The crews of merchantmen become in such cases combatants, and enjoy all the privileges of the members of armed forces. But unless attacked they must not commit hostilities, and if they do so they are liable to be treated as criminals just like private individuals committing hostilities in land warfare.<sup>1</sup>

Deserters  
and  
Traitors.

§ 86. The privileges of members of armed forces cannot be claimed for members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They can be, and always are, treated as criminals. And the like is valid with regard to such treasonable subjects of a belligerent as, without having been members of his armed forces, are fighting in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished.<sup>2</sup>

<sup>1</sup> See Hall, § 183.

<sup>2</sup> See below, § 222, and Hall, § 190.

## VII

## ENEMY CHARACTER

Hall, §§ 167-175—Lawrence, §§ 169-183—Phillimore, III. §§ 82-86—Twiss, II. §§ 152-162—Taylor, §§ 468 and 517—Walker, §§ 39-43—Wharton, III. §§ 352-353—Wheaton, §§ 324-341—Geffcken in Holtzendorff, IV. pp. 581-588—Calvo, IV. §§ 1932-1952—Fiore, III. Nos. 1432-1436—Boeck, Nos. 156-190—Dupuis, Nos. 92-129.

§ 87. Since the belligerents, for the realisation of the purpose of war, are entitled to many kinds of measures against enemy persons and enemy property, the question must be settled as to what persons and what property are vested with enemy character. Now it is, generally speaking, correct to say that, whereas all the subjects of the belligerents and all the property of such subjects bear enemy character, the subjects of neutral States and the property of such subjects do not bear enemy character. This rule has, however, important exceptions. For under certain circumstances and conditions enemy persons and property of enemy subjects may not bear, and, on the other hand, subjects of neutral States and their property may bear, enemy character. And it is even possible that a subject of a belligerent may for some parts bear enemy character as between himself and his home State.<sup>1</sup>

<sup>1</sup> It is impossible to reproduce in a treatise all the details concerning enemy character as worked out by the verdicts of British and American Courts. The following §§ 88-92 attempt to map out the subject under precisely defined and broad principles only, leaving the details to the study of the following leading cases: The *Vigilantia*, 1 Rob. 1; the *Harmony*, 2 Rob. 322; the *Indian Chief*, 3 Rob. 12; the *Portland*,

3 Rob. 44; the *Anna Catherina*, 4 Rob. 119; the *Phoenix*, 5 Rob. 20; the *Ocean*, 5 Rob. 91; the *Jonge Klassina*, 5 Rob. 297; the *Ann*, 1 Dodson, 221; the *Freundschaft*, 4 Wheaton, 105; the *Venus*, 8 Cranch, 253; *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 195.—But it must be specially observed that these principles of the British and American practice are, in spite of their common-sense basis, not

On  
Enemy  
Character  
in general.



Subjects  
of Neutral  
States  
rendering  
services  
to Belligerents.

§ 88. When after the outbreak of war the subject of a neutral State enters into or remains in the armed forces or in the civil service of a belligerent, he acquires thereby enemy character to the same extent as an enemy subject. All measures that are allowed during war against enemy subjects are likewise allowed against such subjects of neutrals who have acquired enemy character. Thus, during the late South African War hundreds of subjects of neutral States who were fighting in the ranks of the Boers were captured by Great Britain and retained as prisoners of war till the end of the struggle.

On the other hand, when a subject of a neutral State does not enter the armed forces of a belligerent, but only renders certain specific services to a belligerent, he acquires enemy character to the extent only of such specific services, and every case of such kind must be judged on its own merits. Thus, carriage of contraband and of analogous of contraband are instances of such services.<sup>1</sup> A subject of a neutral State can even *before the outbreak of war* to such a degree identify himself or his property with an intending belligerent, that war can be commenced by an attack<sup>2</sup> upon his person or his property.

A remarkable case of that kind occurred at the outbreak of the Chino-Japanese War in 1894.

generally recognised on all points, and it ought therefore not to be maintained that they represent generally recognised rules of the Law of Nations. The French practice in particular differs in many respects from British and American, as can be seen from Boeck, Dupuis, Calvo, and Fiore.

<sup>1</sup> There is no doubt that neutral merchantmen carrying coal for a

belligerent fleet *en route*, as happened during the Russo-Japanese war when the Baltic Fleet went out to the Far East, bear enemy character. See also below, § 289, concerning the "Rule of 1756."

<sup>2</sup> See Hall, § 168<sup>a</sup>; Takahashi, Cases on International Law during the Chino-Japanese War (1899), pp. 27-51; Holland, Studies, pp. 126-128

On July 14, the "Kow-shing," a British ship, was hired at Shanghai by the Chinese Government to serve as a transport for eleven hundred Chinese soldiers and also for arms and ammunition from Tien-tsin to Korea. She was met on July 25 near the island of Phung-do, in Korean waters, by the Japanese fleet; she was signalled to stop, was visited by some prize officers, and, as it was apparent that she was a transport for Chinese soldiers, she was ordered to follow the Japanese cruiser "Naniwa." But although the British captain of the vessel was ready to follow these orders, the Chinese on board would not allow him to do so. Thereupon, after some further negotiation in vain, the Japanese opened fire and sank the vessel.

§ 89. Enemy subjects having their permanent residence abroad on the territory of a neutral State for the purpose of commerce or pleasure do not bear enemy character, - nor does their property abroad. For although they are enemy subjects, and might return to their home State and take up arms, they are for the time being under the control of a neutral State, and are thereby prevented from carrying on hostilities of any kind. They are, therefore, for all practical purposes, considered neutrals, and the neutral on whose territory they reside can claim that their property, although found on captured enemy ships, is not to be appropriated.

Enemy  
subjects  
domiciled  
abroad.

§ 90. On the other hand, subjects of neutral States domiciled on the territories of the belligerents acquire in a sense enemy character, for they contribute by their payment of taxes to the support of the belligerents. And although they cannot be required to take up arms, they belong to the

Subjects  
of Neutral  
States  
domiciled  
on Belligerents'  
territory.

population of the enemy territory. Their ships and goods on the Open Sea and within the territorial waters of the belligerents may therefore be captured, and their property on land is submitted to all measures which may be taken against private property of enemy subjects by the invading enemy. But it should be emphasised that their persons and property do nevertheless not lose the protection of their neutral home-State against treatment inconsistent with the laws of war.<sup>1</sup>

Subjects  
of Belligerents  
domiciled  
on each  
other's  
Territory.

§ 91. Since domicile is in many respects the test of enemy character, the private property of even such belligerents' subjects as are domiciled on each other's territory and allowed to remain there after the outbreak of the war acquires enemy character in the eyes of the belligerent Power whose subjects they are. The goods of such subjects on enemy ships may therefore be captured by the men-of-war of their home State, and their property on land is submitted to all measures which may be taken against private property of enemy subjects by the invading enemy. On the other hand, the private property of such enemy subjects loses its enemy character in the eye of the belligerent Power on whose territory they are allowed to remain, and therefore cannot be captured by his men-of-war, although found on enemy ships.

Property  
of foreigners  
on Enemy  
Territory  
or incorporated  
in Enemy  
Trade.

§ 92. The property of such subjects of neutral States as are not domiciled on enemy territory may nevertheless be vested with enemy character. Thus, the produce of an estate on enemy territory belonging to a neutral foreigner abroad may be captured, as may also all such property of neutral foreigners abroad, having a house of trade on enemy territory, as

<sup>1</sup> See below, § 318.

is concerned in commercial transactions of such house. Thus, further, merchantmen owned by subjects of neutral States, but sailing under enemy flag, may be captured.<sup>1</sup>

<sup>1</sup> See below, § 198. As regards of enemy goods thereon during effect of sale of enemy vessels and war, see below, §§ 199 and 200.

## CHAPTER II

### THE OUTBREAK OF WAR

#### I

#### COMMENCEMENT OF WAR

Grotius, c. 3, §§ 5-14—Bynkershoek, *Quaestiones juris publ.* I. c. 2—Vattel, III. §§ 51-65—Hall, § 123—Lawrence, § 161—Manning, pp. 161-163—Phillimore, III. §§ 51-56—Twiss, II. §§ 31-40—Halleck, I. pp. 521-526—Taylor, §§ 455-456—Walker, § 37—Wharton, III. § 333-335—Wheaton, § 297—Bluntschli, §§ 521-528—Heffter, § 120—Lueder in Holtzendorff, IV. pp. 332-347—Gareis, § 80—Liszt, § 39, V.—Ullmann, § 145—Bonfilis, Nos. 1027-1043—Despaguet, Nos. 517-520—Pradier-Fodéré, VI. Nos. 2671-2693—Rivier, II. pp. 220-228—Calvo, IV. §§ 1899-1911—Fioré, III. Nos. 1272-1276—Martens, II. § 109—Longuet, §§ 1-7, 15-16—Mérignhac, pp. 29-41—Pillet, pp. 61-72—Lawrence, War, pp. 26-44—Brocher in R.I., IV. (1872), p. 400; Féraud-Giraud in R.I., XVII. (1885), p. 19; Nagaoka in R.I., 2nd ser. VI. p. 475—Holland, *Studies*, p. 115—Sainte-Croix, "La Déclaration de guerre et ses effets immédiats" (1892)—Bruyas, "De la déclaration de guerre," &c. (1899)—Rolin in *Annuaire*, XX. (1904), pp. 64-70—Ebren and Martens in R. G. xi. (1904), pp. 133-150.

Three  
modes of  
commencing  
War.

§ 93. A state of war may in fact arise either through a declaration of war, or through a proclamation and manifesto of a State that it considers itself at war with another State, or, thirdly, through committing certain hostile acts of force against another State. In practice all the three modes of commencing war occur, and history presents many instances of wars commenced in one or other way. If the practice of the States is taken into consideration, it becomes apparent that no rule of the Law of Nations is in existence which prescribes to intending belligerents

the way in which war is to be commenced. The only rules which may be said to exist concerning the commencement of war are that negotiation<sup>1</sup> must precede war, and that, according to article 2 of the Hague Convention for the peaceful settlement of international differences, recourse must be had, *as far as circumstances allow it*,<sup>2</sup> to the good offices or mediation of one or more friendly Powers.

§ 94. A declaration of war is a communication of one State to another that it considers a condition of war existing between them. In former times declarations of war used to take place under greater or lesser solemnities, but nowadays all these solemnities have disappeared, and declarations of war take place through a simple communication in any form. They may even be coupled with an ultimatum, and they are in such a case conditional declarations of war, no war being declared if the respective State submits to the ultimatum. Many writers maintain that there is a rule of International Law forbidding the commencement of war without a declaration of war. But such rule, in fact, does not exist, for a great many wars take place without an initiative declaration of war. Nor is the necessity of a declaration of war stipulated by a general treaty or obligatory according to a recognised custom of the members of the Family of Nations.<sup>3</sup>) It must be specially observed that, in case of a declaration of war, the war is considered to have been commenced with the date of its declaration although hostilities may not have been commenced till a much later date.

Declara-  
tion of  
War.

<sup>1</sup> See above, § 3, where the rule is quoted that no State is allowed to use compulsive means of settling disputes before negotiation has been tried,

<sup>2</sup> As regards the juristic value of this clause, see above, § 10, No. 1.

<sup>3</sup> See below, § 96.

War  
Manifestoes.

§ 95. A manifesto or proclamation of war is a public announcement of a State to its subjects, to neutral States, or *urbi et orbi*, that it considers itself at war with another State. A war manifesto may be an initiative step of war, or follow either a declaration of war or the actual commencement of war through a hostile act of force. The assertion of many writers that, if not a declaration of war, at least a manifesto is necessary for the commencement of war, is not based on a generally recognised rule of International Law, although the publication of war manifestos has become more and more usual in the nineteenth century. And it must be emphasised that there is good reason for the maintenance of this usage, for war is not only a relation between the belligerents but also between these and neutral States, and the latter cannot be held to fulfil the duties of neutrality before they know of the outbreak of war.

Initiative  
hostile  
Acts of  
War.

§ 96. Hostile acts of force initiative of war are such hostile acts as are considered by the other party acts of war, since, as has been stated above, § 55, hostile acts of force may be committed by a State against another without war breaking out thereby, the passive party acquiescing in the act. For a war to commence by unilateral hostile acts of force, it is at least necessary that the passive party declares *expressis verbis*, or through unmistakable conduct, that it considers these hostilities as acts of war. Of what kinds of acts these hostilities may consist, it cannot be decisively laid down. They may, to give examples, consist of occupation of a part of foreign territory, an inroad into a foreign country, the blockade of a harbour, an attack on the frontier, an attack on a man-of-war, the capture of a merchantman, and the like. And it must be specially observed that the

respective acts of force need not at all be intended to be hostile, provided they are hostile *de facto*. Thus, acts of force by way of reprisals or during a pacific blockade or an intervention may be considered acts of war by the passive party and thereby contain the commencement of war, although they were not intended as acts of war.

That a war initiated by acts of force without a previous declaration or manifesto of war is nevertheless war according to International Law, nobody denies. But many writers assert that the commencement itself of such a war contains a violation of International Law. If this were correct, many<sup>1</sup> important, and in their results far-reaching, wars of the seventeenth, eighteenth, and nineteenth centuries would have been begun with a violation of International Law. But the very fact of these numerous wars having been commenced through hostile acts of force only, shows that the practice of the States never adopted the alleged<sup>2</sup> rule of the necessity of a declaration or a manifesto of war. This does not mean that a State would be justified in opening hostilities without any preceding conflict. There is no greater violation of the Law of Nations than that committed by a State which commences hostilities in time of peace without previous controversy and without having tried to settle the difference through negotiation.<sup>3</sup> But after negotiation has been tried in vain, a State -

*Same argument*

<sup>1</sup> See Maurice, *Hostilities without Declaration of War* (1883).

<sup>2</sup> It cannot be denied that many influential publicists insist upon necessity of a declaration of war. See, for instance, Grotius, III. c. 3, § 6; Vattel, III. § 51; Calvo, IV. § 1907; Bluntschli, § 521; Fiore, III. No. 1274; Heffter, § 120. But the practice of the States has

never accepted this opinion, and there are many publicists who approve of this practice. See, for instance, Bynkershoek, *Quaest. jur. publ. I. c. 2*; Klüber, § 238; G. F. Martens, § 267; Twiss, II. § 35; Phillimore, III. §§ 51-55; Hall, 123; Garais, § 80; Lisst, § 39; Ullmann, § 145.

<sup>3</sup> See above, § 93.



does not act treacherously in case it resorts to hostilities without a declaration of war, especially after diplomatic intercourse has been broken off.

## II

### EFFECTS OF THE OUTBREAK OF WAR

Vattel, III. § 63—Hall, §§ 124-126—Lawrence, §§ 165-168—Manning, pp. 163-165—Phillimore, III. §§ 67-91—Twiss, II. §§ 41-61—Halleck, I. pp. 526-552—Taylor, §§ 461-468—Walker, §§ 44-50—Wharton, III. §§ 336-337A—Wheaton, §§ 298-319—Heffter, §§ 121-123—Lueder in Holtzendorff, IV. pp. 347-363—Gareis, § 81—Liszt, § 39, V—Ullmann, §§ 146-147—Bonfilis, Nos. 1044-1065—Despagnet, Nos. 521-523—Pradier-Fodéré, VI. Nos. 2694-2720—ivier, II. pp. 228-237—Calvo, IV. §§ 1911-1931—Fiore, III. Nos. 1290-1301—Martens, II. § 109—Longuet, §§ 8-15—Mérignhac, pp. 42-65—Pillet, pp. 72-84—Lawrence, War, pp. 45-55—Sainte Croix, "La Déclaration de guerre et ses effets immédiats" (1892), pp. 166-207.

General  
Effects of  
the Out  
break of  
War.

§ 97. When war breaks out, although it is limited to only two members of the Family of Nations, nevertheless the whole Family of Nations is thereby affected, since the rights and duties of neutrality devolve upon such States as are not parties to the war. And the subjects of neutral States may feel the consequences of the outbreak of war in many ways. War is not only a calamity to the commerce and industry of the whole world, but also involves the alteration of the legal position of neutral merchantmen on the Open Sea, and of the subjects of neutral States within the boundaries of the belligerents. For the belligerents have the right of visit, search, and eventually capture of neutral merchantmen on the Open Sea, and foreigners who remain within the boundaries of the belligerents acquire, although sub-

jects of neutral Powers, enemy character.<sup>1</sup> However, the outbreak of war tells chiefly and directly upon the relations between the belligerents and their subjects. Yet it would not be correct to maintain that all legal relations disappear with the outbreak of war between the parties thereto and between their subjects. War is not a condition of anarchy and indifferent or hostile to law, but a fact recognised and ruled by International Law, although it involves a rupture of peaceful relations between the belligerents, and their subjects also for the most part.

§ 98. The outbreak of war effects at once the rupture of diplomatic intercourse between the belligerents, if such rupture has not already taken place. The respective diplomatic envoys are recalled and ask for their passports, or receive them without any previous request, but they enjoy their privileges of inviolability and extraterritoriality for the period of time requisite for leaving the country. Consular activity comes likewise to an end through the outbreak of war.<sup>2</sup>

Rupture  
of Diplo-  
matic  
Inter-  
course and  
Consular  
Activity.

§ 99. The doctrine was formerly held, and a few writers<sup>3</sup> maintain it even now, that the outbreak of war *ipso facto* cancels all treaties previously concluded between the belligerents, such treaties only excepted as have been concluded especially for the case of war. The vast majority of modern writers on International Law have abandoned this standpoint, and the opinion is pretty general that war by no means annuls every treaty. But unanimity in regard to such treaties as are and such as are not cancelled by war does not exist. Neither does a uniform practice of the States exist, cases having occurred in which States have

Cancella-  
tion of  
Treaties.

<sup>1</sup> See above, § 90.

<sup>2</sup> See above, Vol. I. §§ 413 and 436.

<sup>3</sup> See, for instance, Phillimore, III. § 530, and Twiss, I. § 252, in contradistinction to Hall, § 125.

expressly declared that they considered all treaties annulled through war. Thus the whole question remains as yet unsettled. But nevertheless with the majority of writers a conviction may be stated to exist on the following points:—

(1) The outbreak of war cancels all political treaties between the belligerents, such as treaties of alliance for example, which have not been concluded for the purpose of setting up a permanent condition of things.

(2) On the other hand, it is obvious that such treaties are not annulled as have especially been concluded for the case of war, as treaties in regard to the neutralisation of certain parts of the territories of the belligerents for example.

(3) Such political and other treaties as have been concluded for the purpose of setting up a permanent condition of things are not *ipso facto* annulled by the outbreak of war, but in the treaty of peace nothing prevents the victorious party from imposing upon the other party any alterations in, or even the dissolution of, such treaties.

(4) Such non-political treaties as do not intend to set up a permanent condition of things, as treaties of commerce for example, are not *ipso facto* annulled, but the parties may annul them or suspend them according to discretion.

(5) So-called law-making<sup>1</sup> treaties, as the Declaration of Paris for example, are not cancelled through the outbreak of war. The same is valid in regard to all treaties to which a multitude of States are parties, as the International Postal Union for example, but the belligerents may suspend them, as far as they themselves are concerned, in case the necessities of war compel them to do so.

<sup>1</sup> See above, Vol. I. §§ 18, 492, 555–568.

§ 100. The outbreak of war affects likewise such subjects of the belligerents as are at the time within the enemy's territory. In former times they could at once be retained as prisoners of war, and many States concluded therefore in time of peace special treaties for the time of war expressly stipulating a specified period during which their subjects should be allowed to leave each other's territory unmolested.<sup>1</sup> Through the influence of such treaties, which became pretty general during the eighteenth century, it became an international usage and practice that all enemy subjects must be allowed to withdraw within a reasonable period.\* The last instance of the former rule is seen in the arrest and retention as prisoners of war of some ten thousand Englishmen in 1803 in France when war broke out between Great Britain and France, many of whom were not liberated before 1814. Although during the whole of the nineteenth century no other instance occurred, several publicists<sup>2</sup> even nowadays maintain that according to strict law the old rule is still in force. But this assertion is certainly unfounded. On the contrary, it may safely be maintained that there is now a customary rule of International Law that all enemy subjects must be allowed a reasonable period for withdrawal. But a belligerent need not allow<sup>3</sup> enemy subjects to remain on his territory, although this is sometimes done. Thus, during the Crimean War Russian subjects in Great Britain and France were allowed to remain there, as were likewise Russians in Japan and Japanese in Russia during the Russo-Japanese War. On the other hand, France expelled all Germans during the Franco-German war in 1870, the former

Pre-  
carious  
position  
of Belligerents'  
subjects  
on Enemy  
Territory.

<sup>1</sup> See a list of such treaties in II. p. 230; Liszt, § 39. Hall, § 126, p. 407, note 1.

<sup>2</sup> See above, Vol. I. § 324.

<sup>3</sup> See Twiss, II. § 50; Rivier,

South African Republics expelled most of the British subjects when war broke out in 1899, and Russia, although during the Russo-Japanese War she allowed Japanese subjects to remain in other parts of her territory, expelled them from her provinces in the Far East. In case a belligerent allows the residence of enemy subjects on his territory, he can, of course, give the permission under certain conditions only, such as an oath to remain neutral or a promise not to leave a certain region, and the like.

Trade and  
the like  
between  
the Sub-  
jects of  
Belli-  
gerents.

§ 101. British and American writers assert the existence of rules of International Law that on the outbreak of war, with the exception of contracts which arise out of the condition of war and are permitted under the customs of war, as for instance ransom bills, all contracts, including contracts of partnership concluded before the war between subjects of the belligerents, become extinct or suspended; that no subject of one belligerent can sue or be sued in the Courts of the other belligerent; that all peaceful intercourse, especially trading, is prohibited between the subjects of the belligerents.

*on intention  
of the  
suspension?*

But such a rule of International Law in fact does not exist and has never existed, as International Law has nothing to do with the conduct of private individuals, but is a law between States only and exclusively. The fact is that all the above items are naturally within the competence of Municipal Law, which can govern and has governed them at discretion. The Municipal Law of the belligerents concerned may or may not allow commercial or any other intercourse between their private subjects, may suspend or cancel existing contracts including partnership, may or may not allow an enemy subject to sue and to be sued in Courts of justice.

As regards British<sup>1</sup> law, there is no doubt that it prohibits commercial and other friendly intercourse between British and enemy subjects, cancels existing contracts including partnership, does not allow an enemy subject to sue or to be sued in British Courts. But this British prohibition, which coincides with a similar prohibition on the part of several other States, is not the outcome of the Law of Nations,<sup>2</sup> but of Municipal Law.

§ 102. In former times all private and public enemy property, immoveable or moveable, on each other's territory could be confiscated by the belligerents at the outbreak of war, as could also enemy debts; and the treaties concluded between many States with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of the private property of their subjects. Through the influence of such treaties as well as of Municipal Laws and Decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate private enemy property nor annul enemy debts on their territory. The last case of confiscation of private property is that of 1793, at the outbreak of war between France and Great Britain. No case of confiscation has occurred during the nineteenth century, and although several writers maintain that according to strict law the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of International

Position  
of Belligerent's  
Property  
in the  
Enemy  
State.

<sup>1</sup> The leading case is that of *the Hoop*, 1 Rob. 196.

<sup>2</sup> The only British publicist who seems to agree with me is Manning, p. 167. Discussing the rule that

trade is forbidden between the subjects of the belligerents, he says:

"But this is rather a regulation of Municipal Law than part of the Law of Nations."

Law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent. Accordingly, the embargo of enemy ships in the harbours of the belligerents at the outbreak of war is no longer made use of,<sup>1</sup> and a reasonable time is granted to them to leave those harbours. On the other hand, this rule does not prevent a belligerent from suspending the payment of enemy debts till after the war for the purpose of prohibiting the increase of enemy resources; from seizing public enemy property on his territory, such as funds, ammunition, provisions, and other valuables; and from preventing the withdrawal of private enemy property which may be made use of by the enemy for military operations, such as arms and munitions.<sup>2</sup> And it may be expected in the future that those enemy mail-boats which were built from special designs for the purpose of quickly turning them into cruisers of the navy will be prevented from leaving the ports of a belligerent at the outbreak of war.<sup>3</sup>

<sup>1</sup> See above, § 40, and below, § 364.

<sup>2</sup> The indulgence granted to enemy merchantmen in Russian and Japanese ports at the outbreak of the war in 1904, to leave

those ports unmolested within a certain period of time, was therefore made to depend upon the absence of contraband in the cargoes. See Lawrence, War, p. 52.

<sup>3</sup> See Lawrence, War, p. 55.

## CHAPTER III

### WARFARE ON LAND

#### I

#### ON LAND WARFARE IN GENERAL

Vattel, III. §§ 136-138—Hall, §§ 184-185—Phillimore, III. § 94—Taylor, § 469—Wheaton, § 342—Bluntschli, §§ 534-535—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 388-389—Gareis, § 84—Bonfilis, Nos. 1066-1067—Pradier-Fodéré, VI. Nos. 2734-2741—Longuet, § 41—Mérignhac, p. 146—Pillet, pp. 85-89—Kriegsgebrauch, p. 9—Holland, War, Nos. 5-7.

§ 103. The purpose of war, namely, the overpowering of the enemy, is served in land warfare through two aims,<sup>1</sup>—which are, first, defeat of the enemy armed forces on land, and, secondly, occupation and administration of the enemy territory. The chief means through which belligerents try to realise those aims, and which are always conclusively decisive, are the different sorts of force applied against enemy persons. But beside such violence against enemy persons there are other means which are not at all unimportant, although they play a secondary part only. Such means are: appropriation, utilisation, and destruction of enemy property; siege; bombardment; assault; espionage; utilisation of treason; ruses. All these means of warfare on land must be discussed in this chapter, as must also occupation of enemy territory.

Aims and  
Means of  
Land  
Warfare.

<sup>1</sup> Aims of land warfare must not be confounded with ends of war; see above, § 66.



Lawful  
and  
Unlawful  
Practices  
of Land  
Warfare.

§ 104. But—to use the words of article 22 of the Hague Regulations—“the belligerents have not an unlimited right as to the means they adopt for injuring the enemy.” For not all possible practices of injuring the enemy in offence and defence are lawful, certain practices being prohibited under all circumstances and conditions, and other practices being only under certain circumstances and conditions, or only with certain restrictions, allowed. The principles of chivalry and of humanity have been at work<sup>1</sup> for many hundreds of years to create these restrictions, and their work has not yet reached its end. However, apart from these restrictions, all kinds and degrees of force and many other practices may be made use of in war.

Objects  
of the  
Means of  
Warfare.

§ 105. In a sense all means of warfare are directed against one object only—namely, the enemy State, which is to be overpowered by all legitimate means. Apart from this, the means of land warfare are directed against different objects.<sup>2</sup> Such objects are chiefly the members of the armed forces of the enemy, but likewise, although in a lesser degree, other enemy persons; further, private and public property, fortresses, and roads. Indeed, apart from certain restrictions, everything may eventually be the object of a means of warfare, provided the means are legitimate in themselves and are capable of fostering the realisation of the purpose of war.

Land  
Warfare  
in contra-  
distinction to Sea  
Warfare.

§ 106. Land warfare must be distinguished from sea warfare chiefly for two reasons. First, their circumstances and conditions differ widely from each other, and, therefore, their means and practices differ also. Secondly, the Hague Peace Conference has enacted

<sup>1</sup> See above, § 67.

<sup>2</sup> See Oppenheim, *Die Objekte des Verbrechens* (1894), pp. 64-146, where the relation of human actions with their objects is fully discussed.

rules regarding land warfare only, leaving the further development of the rules regarding sea warfare to custom and usage as hitherto.

## II

### VIOLENCE AGAINST ENEMY PERSONS

Grotius, III. c. 4—Vattel, III. §§ 139-159—Hall, §§ 128, 129, 185—Lawrence, §§ 185, 186, 190-192—Maine, pp. 123-148—Manning, pp. 196-205—Phillimore, III. §§ 94-95—Halleck, II. pp. 14-18—Taylor, §§ 477-480—Walker, § 50—Wheaton, §§ 343-345—Bluntschli, §§ 557-563—Heffter, § 126—Lueder in Holtzendorff, IV. pp. 390-394—Gareis, § 85—Klüber, § 244—Liszt, § 40, III.—G. F. Martens, II. § 272—Ullmann, § 149—Bonfils, Nos. 1068-1071, 1099, 1141—Despagnet, Nos. 528-529—Pradier-Fodéré, VI. Nos. 2742-2758—Rivier, II. pp. 260-265—Calvo, IV. 2098-2105—Fiore, III. Nos. 1317-1320, 1342-1348—Martens, II. § 110—Longuet, §§ 42-49—Mérignhac, pp. 146-165—Pillet, pp. 85-95—Kriegsgebrauch, pp. 9-11—Holland, War, 55-58—Zorn, "Kriegsmittel und Kriegführung im Landkrieg nach den Bestimmungen der Haager Konferenz, 1899" (1902).

§ 107. As war is a contention between States for the purpose of overpowering each other, violence consisting in different sorts of force applied against enemy persons is the chief and decisive means of warfare. These different sorts of force are used against combatants as well as non-combatants, but with discrimination and differentiation. The purpose of application of violence against combatants is their disablement so that they can no longer take part in the fighting. And this purpose may be realised through either killing or wounding them, or making them prisoners. As regards non-combatant members of armed forces, private enemy persons showing no hostile conduct, and officials in important positions, only minor means of force may as a rule be applied,

On  
Violence  
in general  
against  
Enemy  
Persons.

since they do not take part in the armed contention of the belligerents.

Killing  
and  
Wounding  
of Com-  
batants.

§ 108. Every combatant may be killed or wounded, whether a simple private or an officer, or even the monarch or a member of his family. Some publicists<sup>1</sup> assert that it is a usage of warfare not to aim at a sovereign or a member of his family. Be that as it may, there is in strict law<sup>2</sup> no rule preventing the killing and wounding of such illustrious persons. But combatants may only be killed or wounded if they are able and willing to fight or to resist capture. Therefore, such combatants as are disabled by sickness or wounds may not be killed. Further, such combatants as lay down arms and surrender or do not resist being made prisoners may neither be killed nor wounded, but must be given quarter. These rules are universally recognised, and are now expressly enacted by article 23 (c) of the Hague Regulations, although the fury of battle frequently makes single fighters<sup>3</sup> forget and neglect them.

Refusal of  
Quarter.

§ 109. However, the rule that quarter must be given has its exceptions. Although it has of late been the customary rule of International Law, and although the Hague Regulations stipulate now expressly by article 23 (d) that belligerents are prohibited from declaring that no quarter will be given, quarter may nevertheless be refused by way of reprisals for violations of the rules of warfare committed by the other

<sup>1</sup> See Klüber, § 245; G. F. Martens, II. § 278; Heffter, § 126.

<sup>2</sup> Says Vattel, III. § 159: "Mais ce n'est point une loi de la guerre d'épargner en toute rencontre la personne du roi ennemi; et on n'y est obligé que quand on a la facilité de le faire prisonnier." The example of Charles XII. of

Sweden (quoted by Vattel), who was intentionally fired at by the defenders of the fortress of Thorn, besieged by him, and who said that the defenders were in their right, ought to settle the point.

<sup>3</sup> See Baty, International Law in South Africa (1900), pp. 84-85.

side; and, further, in case of imperative necessity, when the granting of quarter would so encumber a force with prisoners that its own security would thereby be vitally imperilled. But it must be emphasised that the mere fact that numerous prisoners cannot safely be guarded and fed by the captors<sup>1</sup> does not furnish an exceptional case to the rule, provided that no vital danger for the captors is therein involved. And it must likewise be emphasised that the former rule is now obsolete according to which quarter could be refused to the garrison of a fortress carried by assault, to the defenders of an unfortified place against an attack of artillery, and to the weak garrison who obstinately and uselessly persevered in defending a fortified place against overwhelming enemy forces.

§ 110. Apart from such means as are expressly prohibited by treaties or custom, all means of killing and wounding that exist or may be invented are lawful. And it matters not whether the means used are directed against single individuals, as swords and rifles, or against large bodies of individuals, as, for instance, shrapnel, Gatlings, and mines. On the other hand, all means are unlawful that render death inevitable or that needlessly aggravate the sufferings of wounded combatants. A customary rule of International Law, now expressly enacted by article 23 (e) of the Hague Regulations, prohibits, therefore, the employment of poison and of such arms, projectiles, and material as cause unnecessary injury. Accordingly: wells, pumps, rivers, and the like from which the enemy draws drinking water must not be poisoned; poisoned weapons must not be made use of; rifles

Lawful  
and  
Unlawful  
Means of  
killing  
and  
wounding  
Combat-  
ants.

<sup>1</sup> Accordingly, the Boers free War set British soldiers free  
quently during the South African whom they had captured.

must not be loaded with bits of glass, irregularly shaped iron, nails, and the like; cannons must not be loaded with chain shot, crossbar shot, red-hot balls, and the like. Another customary rule, now likewise enacted by article 23 (f) of the Hague Regulations, prohibits the killing and wounding of combatants in a treacherous way. Accordingly: no assassin must be hired and no assassination of combatants be committed; no putting of price on the head of an enemy individual is allowed; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.

Explosive  
Bullets.

§ 111. In 1868 a conference met at St. Petersburg for the examination of a Russian proposition with regard to the use of explosive projectiles in war. The representatives of seventeen Powers—namely, Great Britain, Russia, Austria-Hungary, Bavaria, Belgium, Denmark, France, Greece, Holland, Italy, Persia, Portugal, Prussia and the North German Confederation, Sweden-Norway, Switzerland, Turkey, and Wurtemberg (Brazil acceded later on) signed on November 29, 1868, the so-called Declaration of St. Petersburg,<sup>1</sup> which stipulates that the signatory Powers and those who should accede later on renounce in case of war between themselves the employment by their military and naval troops of any projectile of a weight below 400 grammes (14 ounces) which is either explosive or charged with fulminating or inflammable substances. This engagement is obligatory only upon the contracting Powers, and it ceases to be obligatory in case a non-contracting Power takes part in a war between any of the contracting Powers.

<sup>1</sup> See above, Vol. I. § 562, and Martens, N.R.G. XVIII. p. 474.

§ 112. As Great Britain had introduced bullets manufactured at the Indian arsenal of Dum-Dum, near Calcutta, the hard jacket of which did not quite cover the core and which therefore easily expanded and flattened in the human body, the Hague Conference adopted a declaration<sup>1</sup> signed on July 29, 1899, by twenty-three Powers—namely, Austria-Hungary, Germany, Belgium, Denmark, Spain, China, Japan, Mexico, France, Greece, Montenegro, Holland, Persia, Italy, Roumania, Russia, Siam, Servia, Spain, Sweden-Norway, Switzerland, Turkey, and Bulgaria—stipulating that the contracting Powers abstain, in case of war between two or more of them, from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions. Although Great Britain did not sign the Declaration, the British Government withdrew the Dum-Dum bullets during the South African War. And it is to be taken for certain that Great Britain will not in future make use of them in a war with civilised Powers.

Expanding (Dum-Dum) Bullets.

§ 113. The Hague Conference adopted a Declaration,<sup>2</sup> signed on July 29, 1899, by twenty-five Powers—namely, Austria-Hungary, Germany, Luxemburg, Belgium, Denmark, Spain, the United States of America, China, Mexico, France, Greece, Italy, Japan, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden-Norway, Switzerland, Turkey, and Bulgaria—stipulating for a term of five years the prohibition in a war between two or more of the signatory Powers against the launching of projectiles or explosives from balloons or by other methods of a similar nature. This Declaration, not being renewed before the end of five years, expired in July 1904. But a similar Declaration will very likely take its place in the future.

Projectiles and Explosives launched from Balloons.

<sup>1</sup> See Martens, N.R.G., 2nd ser. XXVI. p. 1002.

<sup>2</sup> See Martens, N.R.G. 2nd ser. XXVI. p. 994.

Pro-  
jectiles  
diffusing  
Asphyxia-  
ting or  
Deleterious  
Gases.

§ 114. The Hague Conference also adopted a Declaration,<sup>1</sup> signed on July 29, 1899, by twenty-four Powers—namely, Austria-Hungary, Germany, Luxemburg, Belgium, Denmark, Spain, Mexico, France, Greece, China, Italy, Japan, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden-Norway, Switzerland, Turkey, and Bulgaria—stipulating that the signatory Powers should in a war between two or more of them abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases. This Declaration had the same fate as that concerning projectiles launched from balloons, since it expired in 1904. But its place will probably be taken in the future by a similar Declaration.

Violence  
against  
Non-com-  
batant  
Members  
of Armed  
Forces.

§ 115. It will be remembered from above, § 79, that numerous individuals belong to the armed forces without being combatants. Now, since and in so far as these non-combatant members of armed forces do not take part in the fighting, they may not directly be attacked and killed or wounded. However, they are exposed to all injuries indirectly resulting from the operations of warfare. And with the exception of doctors, chaplains, persons employed in military hospitals, official ambulance men, and the like, who according to articles 2 and 3 of the Geneva Convention enjoy the privilege of neutrality,<sup>2</sup> such non-combatant members of armed forces can certainly be made prisoners, since the assistance they give to the fighting forces may be of great importance.

Violence  
against  
Private  
Enemy  
Persons.

§ 116. Whereas in former times private enemy persons of either sex could be killed or otherwise badly treated according to discretion, and whereas in especial the inhabitants of fortified places taken by assault used to be abandoned to the mercy of the assailants, it became in the eighteenth century a universally recognised customary rule of the Law

<sup>1</sup> See Martens, N.R.G., 2nd ser. p. 998.

<sup>2</sup> See below, § 121.

of Nations that private enemy individuals should not be killed or attacked. In so far as they do not take part in the fighting, they may not be directly attacked and killed or wounded. They are, however, like non-combatant members of the armed forces, exposed to all injuries indirectly resulting from the operations of warfare. Thus, for instance, when a town is bombarded and thousands of inhabitants are thereby killed, or when a train carrying private individuals as well as soldiers is wrecked by a mine, no violation of the rule prohibiting attack on private enemy persons has taken place.

As regards captivity, the rule is that private enemy persons may not be made prisoners of war. But this rule has exceptions conditioned by the carrying out of certain military operations, the safety of the armed forces, the order and tranquillity of occupied enemy territory. Thus, for instance, influential enemy citizens who try to incite their fellow-citizens to take up arms can be arrested and deported into captivity. And even the whole population of a province may be imprisoned in case a levy *en masse* is threatening.

Apart from captivity, restrictions of all sorts may be imposed upon and means of force may be applied against private enemy persons for many purposes. Such purposes are:—the keeping of order and tranquillity on occupied enemy territory; the prevention of any hostile conduct, especially conspiracies; the prevention of intercourse with and assistance to the enemy forces; the securing of the fulfilment of the commands and requests of the military authorities, such as for the provision of guides, drivers, hostages, farriers; the securing of the compliance with requisitions and contributions, of the execution of public works necessary for military operations, such as the building



of fortifications, roads, bridges, soldiers' quarters, and the like. What kind of violent means may be applied for these purposes is in the discretion of the respective military authorities, who on their part will act according to expediency and the rules of martial law established by the belligerents. But there is no doubt that, if necessary, capital punishment and imprisonment<sup>1</sup> are lawful means for these purposes. The essence of the position of private individuals in modern warfare with regard to violence against them finds expression in article 46 of the Hague Regulations, which lays down the rule that "family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected."

Violence  
against  
the Head  
of the  
Enemy  
State and  
against  
Officials in  
Important  
Positions.

§ 117. The head of the enemy State and officials in important positions who do not belong to the armed forces occupy a similar position to private enemy persons in their liability to direct attack, death, or wounds. But they are so important for the enemy State, and they may be so useful for the enemy and so dangerous to the invading forces, that they can certainly be made prisoners of war. If belligerents can get hold of each other's heads of States and Cabinet Ministers, they will certainly remove them into captivity. And they can do the same with diplomatic agents and other officials of importance, because by weakening the enemy Government they may thereby influence the enemy to agree to terms of peace.

<sup>1</sup> That in case of general devastation the peaceful population may be detained in so-called concentration camps, there is no doubt; see below, § 154. And

there is likewise no doubt that hostages may be taken out of the peaceful population; see below, p. 176, note 3, and p. 273, note 2.

## III

## TREATMENT OF WOUNDED, AND DEAD BODIES

Hall, § 130—Lawrence, § 188—Maine, pp. 156-159—Manning, pp. 205—Phillimore, III. § 95—Halleck, II. pp. 36-39—Taylor, §§ 527-528—Bluntschli, §§ 586-592—Lueder in Holtzendorff, IV. pp. 289-319, 398-421—Liszt, § 40, V.—Ullmann, § 151 and in R.G. IV. (1897), pp. 437-447—Bonfils, Nos. 1108-1118—Despagnet, Nos. 551-554—Pradier-Fodéré, VI. No. 2794, VII. Nos. 2849-2881—Rivier, II. pp. 268-273—Calvo, IV. §§ 2161-2165—Fiore, III. Nos. 1363-1372—Martens, II. § 114—Longuet, §§ 85-90—Mérignhac, pp. 114-142—Pillet, pp. 165-192—Kriegsgebrauch, p. 26—Holland, Studies, pp. 61-65—Holland, War, Nos. 45-54—Lueder, "Die Genfer Convention" (1876)—Moynier, "La croix rouge, son passé et son avenir" (1882); "La revision de la Convention de Genève" (1898); "La fondation de la croix rouge" (1903)—Buzzati, "De l'emploi abusif . . . de la croix rouge" (1890)—Triepel, "Die neuesten Fortschritte auf dem Gebiet des Kriegarechts" (1894), pp. 1-41—Müller, "Entstehungsgeschichte des rothen Kreuzes und der Genfer Konvention" (1897)—Münzel, "Untersuchungen über die Genfer Konvention" (1901)—Roszkowski in R.I., 2nd ser. IV. (1902), pp. 199, 299, 442—Gillot, "La revision de la Convention de Genève, etc." (1902).

§ 118. Although since the seventeenth century several hundreds of special treaties have been concluded between single States regarding the tending of each other's wounded and the exemption of army surgeons from captivity, no other general rule of the Law of Nations was in existence before the second half of the nineteenth century than this, that the wounded must not be killed, mutilated, or otherwise ill-used. A change for the better was initiated by Jean Henry Dunant, a Swiss citizen from Geneva, who was an eye-witness of the battle of Solferino in 1859, where many thousands of wounded died who could under more favourable circumstances have been saved. When he published, in 1862, his pamphlet, "Un Souvenir de Solférino," the Geneva

Origin of  
Geneva  
Conven-  
tion.

*Société d'utilité publique*, under the presidency of Gustave Moynier, created an agitation in favour of better arrangements for the tending of the wounded on the battlefield, and convoked an international congress at Geneva in 1863, where thirty-six representatives of nearly all the European States met and discussed the matter. In 1864 the Bundesrath, the Government of the Federal State of Switzerland, took the matter officially in hand and invited all European and several American States to send official representatives to a Congress at Geneva for the purpose of discussing and concluding an international treaty regarding the wounded. This Congress met in 1864, and sixteen States were represented. Its result is the international "Convention<sup>1</sup> for the Amelioration of the Condition of Soldiers wounded in Armies in the Field," commonly called "Geneva Convention," signed on August 22, 1864. By-and-by other States than the original signatories joined the Convention. At present the whole body of the civilised States of the world, with the exception of Brazil, Colombia, Costa Rica, Cuba, San Domingo, Ecuador, Haiti, Monaco, Lichtenstein, and Panama, are parties, and it may, therefore, be maintained that its contents are generally recognised International Law. That the rules of the Convention are in no wise perfect, and need supplementing regarding many points, became soon apparent. A second International Congress met at the invitation of Switzerland in 1868 at Geneva, where additional articles<sup>2</sup> to the original Convention were discussed and signed. These additional articles have, however, never been ratified. The Hague Peace

<sup>1</sup> See Martens, N.R.G., XVIII. p. 607, and above, Vol. I. § 560, where the States that have become

parties are enumerated.

<sup>2</sup> See Martens, N.R.G., XVIII p. 61.

Conference in 1899 unanimously formulated the wish that Switzerland should shortly take steps for the assembly of another international congress for the purpose of revising the Geneva Convention. And the Swiss Bundesrath invited a Congress to meet again at Geneva in September, 1903, but this Congress has been postponed. The original Convention is, therefore, still the basis of the present treatment of wounded.

It consists of ten articles, and not only provides rules for the treatment of wounded, but, in the interest of a proper treatment of the wounded, supplies also rules regarding ambulances, military hospitals, the army medical staff, chaplains, orderlies, ambulance men, inhabitants assisting the wounded, and, lastly, an emblem of distinction. Article 21 of the Hague Regulations expressly confirms the Geneva Convention, and the few important States that have not yet become parties to the Geneva Convention will, therefore, become parties in future *ipso facto* by acceding to the Hague Regulations, since article 21 thereof enacts categorically that belligerents<sup>1</sup> are bound by the Geneva Convention or any future modification thereof.

§ 119. According to article 6 of the Geneva Convention<sup>2</sup> the collection of the wounded and their tending must take place without distinction of parties. Evacuation of hospitals, together with the persons under whose directions the evacuation takes

The  
Wounded  
and the  
Sick.

<sup>1</sup> Thus Mexico, although she did not expressly accede to the Geneva Convention before 1905, indirectly became a party to it in 1899 through becoming a party to the Hague Regulations.

<sup>2</sup> The Geneva Convention has in its separate stipulations been severely criticised by humanita-

rians as well as military men, and several proposals for its improvement have been made. It cannot be the task of a treatise to reproduce these criticisms, but readers who take an interest in the matter will find the necessary information in the monographs quoted above at the commencement of § 118.

place, shall be protected by an absolute neutrality. With consent of both parties, and when circumstances permit it, commanders-in-chief have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement. Those wounded enemy soldiers who are not thus delivered back and who, after their wounds are healed, are recognised as unfit for further military service, must be sent back to their country at once. According to article 5 of the unratified additional articles of 1868 even those wounded who are not unfit for further service, superior officers excepted, are to be sent back to their country on parole.

Ambulances and  
Military  
Hospitals.

§ 120. Ambulances and military hospitals, as long as any sick or wounded are therein, are considered neutral and must be protected and respected by the belligerents, but their neutrality ceases in case an ambulance or hospital should be held by a military force (Geneva Convention, article 1). Whereas the equipment of military hospitals may be appropriated by an enemy for the purpose of tending the wounded generally, the equipment of ambulances is as immune from seizure as the ambulances themselves (Geneva Convention, article 4). According to article 3 of the unratified additional articles of 1868 field hospitals and other temporary establishments which follow the troops on the field of battle to give temporary help to the sick and wounded are to enjoy the same privileges as ambulances.

Army  
Medical  
Staff, and  
the like.

§ 121. All persons employed in hospitals and ambulances, whether doctors, chaplains, or ambulance men, or members of the staff for superintendence and administration, enjoy perfect neutrality whilst so employed and so long as there remain any wounded to bring in or to succour (Geneva Convention, article 2).

After occupation of the territory by the enemy, all these persons may either continue to fulfil their duties in the hospital or ambulance they belong to, or withdraw in perfect freedom for the purpose of rejoining the forces to which they belong. If they choose the latter, they must be delivered up by the occupant to the outposts of the enemy (Geneva Convention, article 3), and they can carry away all their private property and, further, their ambulances together with equipment (article 3). According to article 1 of the unratified additional articles of 1868, such persons shall be obliged to continue to fulfil their duties when necessary, even after occupation of a territory, and, when they make a demand to withdraw, the commander of the occupying forces shall fix the moment of their departure, which, except in case of military necessity, cannot under any circumstances be delayed.

§ 122. Inhabitants who bring help to the wounded must be respected and remain free. If they receive and nurse wounded in their houses, the houses shall thereby enjoy special protection, and the inhabitants shall be exempted<sup>1</sup> from the quartering of troops as well as from a part of the contributions of war that may be imposed (Geneva Convention, article 5). Article 4 of the unratified additional articles of 1868 contains an interpretation of this rule, explaining that, as regards the quartering of troops and contributions of war, account will only be taken in an equitable degree of the charitable zeal exhibited by inhabitants.

In-  
habitants  
nursing  
the  
Wounded.

§ 123. Hospitals, ambulances, and evacuations must fly, together with their national flags, a white flag with a red cross, and the persons who are

Distinc-  
tive  
Emblem.

<sup>1</sup> See below, §§ 147 and 148.

neutralised on account of their services to hospitals and the like are allowed to wear white arm badges with a red cross (Geneva Convention, article 7). Although the Geneva Convention stipulates expressly the red cross as its distinctive emblem, the parties do not object to non-Christian States who object to the cross on religious grounds adopting another emblem. Thus Turkey has substituted a red half-moon, and Persia a red sun for the cross.<sup>1</sup>

Treat-  
ment of  
Dead  
Bodies.

§ 124. According to a customary rule of the Law of Nations belligerents have the right to demand from each other that dead bodies of their soldiers shall not be disgracefully treated, especially not mutilated, and shall as far as possible be collected and buried<sup>2</sup> by the victor on the battlefield. Pieces of equipment found upon such bodies are public enemy property and may, therefore, be appropriated as booty<sup>3</sup> by the victor. But money, jewellery, and other valuables found upon them, which are apparently private property, are not booty, and must, according to article 14 of the Hague Regulations, be handed over to the Bureau of Information<sup>4</sup> relative to the prisoners of war, which has to transmit them to those interested.

<sup>1</sup> See below, § 207.

<sup>2</sup> See Grotius, II. c. 19, §§ 1 and 3. Regarding a valuable suggestion of Ullmann's concerning sanitary measures for the purpose of

avoiding epidemics, see above, Vol. I. § 588, note 5.

<sup>3</sup> See below, § 139.

<sup>4</sup> See below, § 130.

## IV

## CAPTIVITY

Grotius, III. c. 14—Bynkershoek, *Quaest. jur. publ. I. c. 3*—Vattel, III. §§ 148-154—Hall, §§ 131-134—Lawrence, § 187—Maine, pp. 160-167—Manning, pp. 210-222—Phillimore, III. § 95—Twiss, II. § 177—Halleck, II. pp. 19-30—Taylor, §§ 519-524—Wharton, III. §§ 348-348D—Wheaton, § 344—Bluntschli, §§ 593-626—Heffter, §§ 127-129—Lueder in Holtzendorff, IV. pp. 423-445—Ullmann, § 150—Bonfilis, Nos. 1119-1140—Despagnet, Nos. 545-550—Pradier-Fodéré, VII. Nos. 2796-2842—Rivier, II. pp. 273-279—Calvo, IV. §§ 2133-2157—Fiore, III. Nos. 1355-1362—Martens, II. § 113—Longuet, §§ 77-83—Mérignhac, pp. 87-113—Pillet, pp. 145-164—Kriegsgebrauch, pp. 11-18—Holland, War, Nos. 28-44—Eichelmann, "Über die Kriegsgefangenschaft" (1878)—Romberg, "Des belligérants et des prisonniers de guerre" (1894)—Triepel, "Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts" (1894), pp. 41-55—Holla, "The Peace Conference at the Hague" (1900), pp. 145-151—Cros, "Condition et traitement des prisonniers de guerre" (1900).

§ 125. During antiquity, prisoners of war could be killed, and they were very often at once actually butchered or offered as sacrifices to the gods. If they were spared, they were regularly made slaves and only exceptionally liberated. But belligerents also exchanged their prisoners or liberated them for ransom. During the first part of the Middle Ages prisoners of war could likewise be killed or made slaves. Under the influence of Christendom, however, their fate became by-and-by mitigated. Although they were often most cruelly treated, they were, during the second part of the Middle Ages, usually no longer killed and, with the disappearance of slavery in Europe, no longer enslaved. At the time when modern International Law gradually came into existence, killing and enslaving of prisoners of war had disappeared, but they were often treated like criminals and as an object of personal revenge.

Develop-  
ment of  
Internat-  
ional Law  
regarding  
Captivity.



They were not considered in the power of the State whose forces captured them, but in the power of those very forces or the single soldiers that had made the capture. And it was considered lawful on the part of captors to make as much profit as possible out of their prisoners by way of ransom, provided no exchange of prisoners took place. So general was this practice that a more or less definite scale of ransom became usual. Thus, Grotius (III. c. 14, § 9) mentions that in his time the ransom of a private was the amount of his one month's pay. And since the pecuniary value of a prisoner as regards ransom rose in proportion with his fortune and his position in life and in the enemy army, it became usual that prisoners of rank and note did not belong to the capturing forces but to the Sovereign, who had, however, to recompense the captors. During the seventeenth century, the custom that prisoners were considered in the power of their captors died away. They were now considered in the power of the respective Sovereign whose forces had captured them. But rules of the Law of Nations regarding their proper treatment were hardly in existence. The practice of liberating prisoners in exchange or for ransom only continued. Special cartels were often concluded at the outbreak of or during the war for the purpose of stipulating a scale of ransom according to which either belligerent could redeem his soldiers and officers from captivity. The last<sup>1</sup> instance of such cartels is that between England and France in 1780, stipulating the ransom for members of the naval and military forces of both belligerents.

It was not before the eighteenth century, with its general tendencies to mitigate the cruel practices of

<sup>1</sup> See Hall, § 134, p. 428, note 1.

warfare, that matters changed for the better. The conviction became by-and-by general that captivity should only be the means of preventing prisoners from returning to their corps and taking up arms again, and should, as a matter of principle, be distinguished from imprisonment as a punishment for crimes. The Treaty of Friendship<sup>1</sup> concluded in 1785 between Prussia and the United States of America is probably the first that stipulates (article 24) a proper treatment of prisoners of war, prohibiting confinement in convict prisons and the use of irons, and ordering confinement for them in a healthy place, where they can have exercise, and where they are kept and fed as troops. During the nineteenth century the principle that prisoners of war should be treated by the captor analogously to his own troops became generally recognised, and the Hague Regulations have now, by their articles 4 to 20, enacted exhaustive rules regarding captivity.

§ 126. According to articles 4-7 and 16-19 of the Hague Regulations prisoners of war are not in the power of the individuals or corps who captured them, but in the power of the Government of the captor. They must be humanely treated. All their personal belongings remain their property, with the exception of arms, horses, and military papers, which are booty.<sup>2</sup> They can be imprisoned as an indispensable matter of safety only. They may, therefore, be detained in a town, fortress, camp, or any other locality, and they may be bound not to go beyond a certain fixed boundary. But they cannot be kept in convict prisons. Their labour may be utilised by the Government according to their rank and aptitude, but their tasks must not be excessive and must have

Treat-  
ment of  
Prisoners  
of War.

<sup>1</sup> See Martens, N.R., IV. p. 37.    <sup>2</sup> See below, § 144.

nothing to do with the military operations. Work done by them for the State must be paid for in accordance with tariffs in force for soldiers of the national army employed on similar tasks. But prisoners of war may also be authorised to work for the public service or for private persons under conditions of employment to be settled by the military authorities, and they may likewise be authorised to work on their own account. All wages they receive go towards improving their position, and a balance must be paid to them at the time of their release, after deducting the cost of their maintenance. But whether they earn wages or not, the Government is bound under all circumstances to maintain them, and prepare quarters, food, and clothing for them on the same footing as for its own troops. Officer prisoners may, if necessary, receive the full pay allowed to their rank by their country's regulations, the amount to be repaid by their Government. All prisoners of war must enjoy every latitude in the exercise of their religion, including attendance at their own church service, provided only they comply with the regulations for order issued by the military authorities. If prisoners want to make a will, it shall be received by the authorities or drawn up on the same conditions as for soldiers of the national army. And the same rules are valid regarding death certificates and the burial of prisoners of war, due regard to be paid to their grade and rank. Letters, money orders, valuables, and postal parcels destined for or despatched by prisoners of war must enjoy free postage, and gifts and relief in kind for prisoners of war must be admitted free from all custom and other duties as well as payments for carriage by Government railways (article 16).

§ 127. Every individual who is deprived of his liberty not for a crime but for military reasons has a claim to be treated as a prisoner of war. Article 13 of the Hague Regulations enacts expressly that non-combatant<sup>1</sup> members of the armed forces, such as newspaper correspondents, reporters, sutlers, contractors, who are captured and retained, can claim to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying. But although the Hague Regulations do not contain anything regarding the treatment of private enemy individuals and enemy officials whom a belligerent thinks it necessary<sup>2</sup> to make prisoners of war, it is evident that they can claim all privileges of such prisoners. Such individuals are not convicts; they are taken into captivity for military reasons, and they are therefore prisoners of war.

Who may  
claim  
to be  
Prisoners  
of War.

§ 128. Articles 8 and 9 of the Hague Regulations lay down the discipline over prisoners of war in the following way:—Every prisoner who, if questioned, does not declare his true name and rank is liable to a curtailment of the advantages accorded to prisoners of his class. All prisoners are subject to the laws, regulations, and orders in force in the army of the belligerent that keeps them in captivity. Any act of insubordination on the part of prisoners can be punished in accordance with these laws.<sup>3</sup> And apart from this, all kinds of severe measures are admissible to prevent further similar acts. Escaped prisoners, who, after having rejoined the army, are again taken prisoners, are not liable to any punishment for their

Dis-  
cipline.

<sup>1</sup> See above, § 79.

<sup>2</sup> See above, §§ 116 and 117.

<sup>3</sup> Concerning the question whether after conclusion of peace such prisoners may be retained as are undergoing a term of imprisonment for disciplinary offences, see below, § 275.

flight. But if they are recaptured before they succeed in rejoining their army, or before they quitted the territory occupied by the capturing forces, they are liable to disciplinary punishment.

Release  
on Parole.

§ 129. Articles 10 to 12 of the Hague Regulations deal with release on parole in the following manner:— No belligerent is obliged to assent to a prisoner's request to be released on parole, and no prisoner can be forced to accept such release. But if the laws of his country authorise him to do so, and if he acquiesces, any prisoner may be released on parole. In such case he is in honour bound scrupulously to fulfil the engagement he has contracted, both as regards his own Government and the Government that released him. And his own Government is formally bound neither to request of nor to accept from him any service incompatible with the parole given. Any prisoner released on parole and recaptured bearing arms against the belligerent who released him, or against such belligerent's allies, forfeits the privilege to be treated as prisoner of war, and can be tried by court-martial. The Hague Regulations do not lay down the punishment for such breach of parole, but according to a customary rule of International Law the punishment may be capital.

Bureau of  
Information.

§ 130. According to articles 14 and 16 of the Hague Regulations every belligerent must institute on the commencement of war a Bureau of Information relative to his prisoners of war. This Bureau is intended to answer all inquiries about prisoners. It must be furnished by all the services concerned with all the necessary information to enable it to keep an individual return for each prisoner. It must be kept informed of internments and changes as well as of admissions into hospital and of deaths.

The Bureau must likewise receive and collect all objects of personal use, valuables, letters, and the like, found on battlefields <sup>1</sup> or left by prisoners who have died in hospital or ambulance, and must transmit these articles to those interested. The Bureau must enjoy the privilege of free postage.

§ 131. A new and valuable rule, taken from the Brussels Declaration, is that of article 15 of the Hague Regulations making it a duty of every belligerent to grant facilities to Relief Societies for prisoners of war with the object of serving as the intermediary for charity. The condition of the admission of such societies and their agents is that the former are regularly constituted in accordance with the law of their country. Delegates of such societies may be admitted to the places of internment for the distribution of relief, as also to the halting-places of repatriated prisoners, through a personal permit of the military authorities, provided they give an engagement in writing that they will comply with all regulations by the authorities for order and police.

Relief  
Societies.

§ 132. Captivity can come to an end through different modes. Apart from release on parole, which has already been mentioned, captivity comes to an end—(1) through simple release without parole; (2) through successful flight; (3) through liberation by the invading enemy to whose army the respective prisoners belong; (4) through exchange for prisoners taken by the enemy; (5) through prisoners <sup>2</sup> being brought into neutral territory by captors who take refuge there; and, lastly (6), through the war coming to an end. Release of prisoners for ransom is no longer practised, except in the case of the crew of a captured merchantman released on a ransom bill.<sup>3</sup>

End of  
Captivity.

<sup>1</sup> See above, § 124.

<sup>2</sup> See below, § 337.

<sup>3</sup> See below, § 195.

It ought, however, to be observed that the practice of ransoming prisoners might be revived if convenient, provided the ransom is to be paid not to the individual captor but to the belligerent whose forces made the capture.

As regards the end of captivity through the war coming to an end, a distinction must be made according to the different modes of ending war. If the war ends by peace being concluded, captivity comes to an end at once<sup>1</sup> with the conclusion of peace, and, as article 20 of the Hague Regulations expressly enacts, the repatriation of prisoners must be effected as speedily as possible. If, however, the war ends through conquest and annexation of the vanquished State, captivity comes to an end as soon as peace is established. It ought to end with annexation, and it will in most cases do so. But as guerilla war may well go on after conquest and annexation, and thus prevent a condition of peace from being established, although real warfare is over, it is necessary not to confound annexation with peace.<sup>2</sup> The point is of interest regarding such prisoners only as are subjects of neutral States. For other prisoners become through annexation subjects of the State that keeps them in captivity, and such State is, therefore, as far as International Law is concerned, unrestricted in taking any measure it likes with regard to them. It can repatriate them, and it will in most cases do so. But if it thinks that they might endanger its hold over the conquered territory, it might likewise prevent their repatriation for any definite or indefinite period.<sup>3</sup>

<sup>1</sup> That nevertheless the prisoners remain under the discipline of the captor until they have been handed over to the authorities of their home State, will be shown below, § 275.

<sup>2</sup> See above, § 60.

<sup>3</sup> Thus, after the South African War, Great Britain refused to repatriate all those prisoners of war who on their part refused to take the oath of allegiance.

V

APPROPRIATION AND UTILISATION OF PUBLIC  
ENEMY PROPERTY

Grotius, III. c. 5—Vattel, III. §§ 73, 160-164—Hall, §§ 136-138—Lawrence, § 195—Maine, pp. 192-206—Manning, pp. 179-183—Twiss, II. §§ 62-71—Halleck, II. pp. 58-68—Taylor, §§ 529-536—Wharton, III. § 340—Wheaton, §§ 346, 352-354—Bluntschli, §§ 644-651A—Heffter, §§ 130-136—Lueder in Holtzendorff, IV. pp. 488-500—G. F. Martens, II. §§ 279-280—Ullmann, § 155—Bonfilis, Nos. 1176-1193—Despagnet, Nos. 590-602—Pradier-Fodéré, VII. Nos. 2989-3018—Rivier, II. pp. 306-314—Calvo, IV. §§ 2199-2214—Fiore, III. Nos. 1389, 1392, 1393, 1470—Martens, II. § 120—Longuet, § 96—Mérignhac, pp. 299-316—Pillet, pp. 319-340—Kriegsgebrauch, pp. 57-60—Holland, War, Nos. 74, 78-81—Rouard de Card, "La guerre continentale et la propriété" (1877)—Bluntschli, "Das Beuterecht im Krieg, und das Seebeuterecht insbesondere" (1878)—Depambour, "Des effets de l'occupation en temps de guerre sur la propriété et la jouissance des biens publics et particuliers" (1900).

§ 133. Under a former rule of International Law belligerents could appropriate all public and private<sup>1</sup> enemy property they found on enemy territory. This rule is now obsolete. Its place is taken by several rules, since distinctions are to be made between moveable and immoveable property, public and private property, and, further, between different kinds of private and public property. These rules must be discussed *seriatim*.

Appropriation of all the Enemy Property no longer admissible.

§ 134. Appropriation of public immoveables is not

Immoveable Public Property.

<sup>1</sup> It is impossible for a treatise to go into historical details, and to show the gradual disappearance of the old rule. But it is of importance to state the fact, that even during the nineteenth century—see, for instance, G. F. Martens, II. § 280; Twiss, II. § 64; Hall, § 139—it was asserted that in strict law all private enemy moveable property was as much booty

as public property, although the growth of a usage was recognised which under certain conditions exempted it from appropriation. In the face of articles 46 and 47 of the Hague Regulations these assertions have no longer any basis, and all the text-books of the nineteenth century are now antiquated with regard to this matter.



lawful as long as the territory on which they are has not become State property of the invader through annexation. During mere military occupation of the enemy territory, a belligerent cannot sell or otherwise alienate public enemy land and buildings, but only appropriate the produce of them. Article 55 of the Hague Regulations stipulates expressly that a belligerent occupying enemy territory shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State and situated on the occupied territory; that he must protect the stock and plant, and that he must administer them according to the rules of usufruct. He can, therefore, sell the crop from public land, cut timber in the public forests and sell it, can let public land and buildings for the time of his occupation, and the like. He is, however, only usufructuary, and he is, therefore, prohibited from exercising his right in a wasteful or negligent way that decreases the value of the stock and plant. Thus, he must, for instance, not cut down a whole forest unless the necessities of war compel him.

Immove-  
able  
Property  
of Muni-  
cipalities,  
and of  
Religious,  
Char-  
itable, and  
the like  
Institu-  
tions.

§ 135. It must, however, be observed that the produce of such public immoveables only as belong to the State itself may be appropriated, but not the produce of those belonging to municipalities and of those which, although they belong to the hostile State, are permanently set aside for religious purposes, for the maintenance of charitable and educational institutions, and for the benefit of art and science. Article 56 of the Hague Regulations stipulates expressly that such property is to be treated as private property.

§ 136. As far as the necessities of war demand,

a belligerent can make use of public enemy buildings for all kinds of purposes. Troops must be housed, horses stabled, the sick and wounded nursed. Public buildings may in the first instance, therefore, be made use of for such purposes, although they may thereby be considerably damaged. And it matters not whether the buildings belong to the enemy State or to municipalities, whether they are regularly destined for ordinary governmental and municipal purposes, or for religious, educational, scientific, and the like purposes. Thus, churches may be converted into hospitals, schools into barracks, buildings used for scientific research into stables. But it must be observed that such utilisation of public buildings as damages them is justified only if it is necessary. A belligerent who turns a picture gallery into stables without being compelled thereto would certainly commit a violation of the Law of Nations.

Utilisation of Public Buildings.

§ 137. Moveable public enemy property can certainly be appropriated by a belligerent provided that it may directly or indirectly be useful for military operations. Article 53 of the Hague Regulations enacts exhaustively that a belligerent occupying hostile territory can take possession of the cash, funds, realisable<sup>1</sup> securities, dépôts of arms, means of transport, stores, supplies, and of all other moveable property of the hostile State which may be used for military operations. Thus, a belligerent is entitled to seize not only the money and funds of the hostile State on the one hand, and, on the other, munitions of war, dépôts of arms, stores and supplies, but also

Moveable Public Property. ✓

<sup>1</sup> The French text of article 53 speaks of "valeurs exigibles," which the official British text renders into English as "property liable to requisition," but which

I prefer to translate as "realisable securities." Holland, War, No. 78, agrees with my translation.

the rolling-stock of public railways and other means of transport and everything and anything he can directly or indirectly make use of for military operations. He can, for instance, seize a quantity of cloth for the purpose of clothing his soldiers.

Moveable  
Property  
of Muni-  
cipalities  
and of  
Religious,  
Charita-  
ble, and  
the like  
Institu-  
tions.

§ 138. But the like exceptions as regards the usufruct of public immoveables are valid for the appropriation of public moveables. Article 56 of the Hague Regulations enumerates the property of municipalities, of religious, charitable, educational institutions, and of those of science and art. Thus the moveable property of churches, hospitals, schools, universities, museums, picture galleries, even when belonging to the hostile State, is exempt from appropriation by a belligerent. As regards archives, they are no doubt institutions for science, but a belligerent may nevertheless seize such State papers deposited therein as are of importance to him in connection with the war. The last instances of the former practice are presented by Napoleon I., who seized works of art during his numerous wars and had them brought to the galleries of Paris. But they had to be restored to their former owners in 1815.

Booby  
on the  
Battle-  
field.

§ 139. Different from the case of moveable enemy property found by an invading belligerent on enemy territory is the case of moveable enemy property on the battlefield. According to a former rule of the Law of Nations all enemy property, be it public or private, which a belligerent could get hold of on the battlefield was booty and could be appropriated. Although some publicists<sup>1</sup> who wrote before the Hague Peace Conference of 1899 still teach the validity of this rule, it is obvious from articles 4 and 14 of the

<sup>1</sup> See, for instance, Halleck, II. p. 73, and Heffter, § 135.

Hague Regulations that it is now obsolete as regards *private*<sup>1</sup> enemy property except arms, pieces of equipment, and the like. But as regards *public* enemy property this customary rule is still valid. Thus weapons, munition, and valuable pieces of equipment which are found upon the dead, the wounded, and the prisoners, whether they are public or private property, may be seized, as may also the war-chest and State papers in possession of a captured commander, enemy horses, batteries, carts, and everything else that is of value. To whom the booty ultimately belongs is not for International but for Municipal Law<sup>2</sup> to determine, since International Law simply says that public enemy property on the battlefield can be appropriated by belligerents. And it must be specially observed that the restriction of article 53 of the Hague Regulations<sup>3</sup> does not find application in the case of moveable property found on the battlefield. For such property may be appropriated, whether it may be used for military operations or not; the mere fact that it was seized on the battlefield entitles a belligerent to appropriate it.

<sup>1</sup> See above, § 124, and below, § 144.

<sup>2</sup> According to British law all booty belongs to the Crown. (See Twiss, II. §§ 64 and 71.)

<sup>3</sup> Article 53 speaks of "an army of occupation" only, and therefore does not concern belligerents on the battlefield.

## VI

## APPROPRIATION AND UTILISATION OF PRIVATE ENEMY PROPERTY

Grotius, III. c. 5—Vattel, III. §§ 73, 160-164—Hall, §§ 139, 141-144—Lawrence, §§ 196-199—Maine, pp. 192-206—Manning, pp. 179-183—Twiss, II. §§ 62-71—Halleck, II. pp. 73-75—Taylor, §§ 529, 532, 537—Wharton, III. § 338—Wheaton, § 355—Bluntschli, §§ 652, 656-659—Heffter, §§ 130-136—Lueder in Holtzendorff, IV. pp. 488-500—G. F. Martens, II. §§ 279-280—Ullmann, § 155—Bonfilis, Nos. 1194-1206—Despagnet, No. 578-589—Pradier-Fodéré, VII. No. 3032-3047—Rivier, II. pp. 318-329—Calvo, IV. §§ 2220-2229—Fiore, III. Nos. 1391, 1392, 1472—Martens, II. § 120—Longuet, §§ 97, 98—Mérignhas, pp. 263-268—Pillet, pp. 319-340—Kriegesgebrauch, pp. 53-56—Holland, War, Nos. 72-73.—See also the monographs of Rouard de Card, Bluntschli, and Depambour, quoted above at the commencement of § 133.

Immove-  
able  
Private  
Property

§ 140. Immoveable private enemy property can under no circumstances and conditions be appropriated by an invading belligerent. If he were nevertheless to confiscate and sell private land or buildings, the buyer would acquire no right<sup>1</sup> whatever to the property. Article 46 of the Hague Regulations enacts expressly that "private property cannot be confiscated." But different from confiscation is the temporary use of private land and buildings for all kinds of purposes demanded by the necessities of war. What has been said above in § 136 with regard to utilisation of public buildings finds equal application<sup>2</sup> to private buildings. If necessary, they may be converted into hospitals, barracks, and stables without indemnification of the proprietors, and they may also be converted into fortifications. A humane belligerent will not drive

<sup>1</sup> See below, § 283.

<sup>2</sup> The Hague Regulations do not mention this; they simply enact

in article 46 that private property must be "respected," and cannot be confiscated.

the wretched inhabitants into the street if he can help it. But under the pressure of necessity he may be obliged to do this, and he is certainly not prohibited from doing it.

§ 141. All kinds of private moveable property which can serve as war material, such as arms, ammunition, cloth for uniforms, leather for boots, saddles, and, further, all private means of transport and communication, such as railway rolling-stock, ships, telegraphs, telephones, carts, and horses, may be seized and made use of for military purposes by an invading belligerent, but they must be restored at the conclusion of peace, and indemnities must be paid for them. This is expressly enacted by article 53 of the Hague Regulations, and although carts and horses are not there enumerated, I have no doubt that they belong to the articles which may be so seized. It is evident that the seizure of such material must be duly acknowledged by receipt, although article 53 does not say so, for otherwise how could "indemnities be paid after the conclusion of peace"? As regards the question who is to pay the indemnities, Holland (War, No. 78) correctly maintains that "the Treaty of Peace must settle upon whom the burden of making compensation is ultimately to fall."

Private  
War  
Material  
and  
Means of  
Trans-  
port.

§ 142. On the other hand, works of art and science and, further, historical monuments may under no circumstances and conditions be appropriated or made use of for military operations. Article 56 of the Hague Regulations enacts categorically that "all seizure" of such works and monuments is prohibited. Therefore, although the metal a statue is cast of may be of the greatest value for cannons, it must not be touched.

Works of  
Art and  
Science,  
Historical  
Monu-  
ments.

Other  
Private  
Personal  
Property.

§ 143. Private personal property which does not consist of war material and means of transport serviceable to military operations can regularly not be seized.<sup>1</sup> Articles 6 and 7 of the Hague Regulations stipulate expressly that "private property cannot be confiscated," and "pillage is formally prohibited." But it must be emphasised that these rules have in a sense exceptions, demanded and justified by the necessities of war. Men and horses must be fed, men must protect themselves against the weather. If there is no time for ordinary requisitions<sup>2</sup> to provide food, forage, clothing, and fuel, or if the inhabitants of a locality have fled so that ordinary requisitions cannot be made, a belligerent must take these articles wherever he can get hold of them, and he is justified<sup>3</sup> in doing so. And it must be further emphasised that quartering<sup>4</sup> of soldiers who, together with their horses, must be well fed by the inhabitants of the respective houses, is likewise lawful, although it may be ruinous to the private individuals concerned.

Booty  
on the  
Battle-  
field.

§ 144. Private enemy property on the battlefield is no longer in every case an object of booty.<sup>5</sup> Saddles, horses, munitions, and especially arms, may indeed be appropriated,<sup>6</sup> even if they are private property, as may also private means of transport, such as carts and other vehicles which an enemy has made use of. But cash, jewellery and other articles of value found upon the dead, wounded, and prisoners must, according to article 14 of the Hague Regulations, be handed over to the Bureau of Information regarding prisoners of war, which must transmit

<sup>1</sup> See above, § 133, note.

<sup>2</sup> See below, § 147.

<sup>3</sup> The Hague Regulations do not mention this case.

<sup>4</sup> See below, § 147.

<sup>5</sup> See above, § 139.

<sup>6</sup> See article 4 of the Hague Regulations, and above, § 139.

them to those interested. Through this article 14 it becomes apparent that nowadays private enemy property, except arms and the like, is no longer booty, although individual soldiers often take as much spoil as they can get. It is impossible for the commanders to bring the offender to justice in every case.<sup>1</sup>

§ 145. Different from the case of private property found by a belligerent on enemy territory is the case of such property brought during time of war into the territory of a belligerent. That private enemy property on a belligerent's territory at the time of outbreak of war cannot be confiscated has already been stated above in § 102. Taking this fact into consideration, as well as the other fact that private property found on enemy territory is nowadays likewise as a rule exempt from confiscation, there can be no doubt that private enemy property brought into a belligerent's territory during time of war can regularly not be confiscated.<sup>2</sup> On the other hand, a belligerent can prohibit the withdrawal of those articles of property which may be made use of by the enemy for military purposes, such as arms, ammunition, provisions, and the like. And in analogy with article 53 of the Hague Regulations there can be no doubt that a belligerent can seize such articles and make use of them for military purposes, provided that he restores them at the conclusion of peace and pays indemnities for them.

Private  
Enemy  
Property  
brought  
into a  
Belli-  
gerent's  
Territory.

<sup>1</sup> It is of interest to state the fact that, during the Russo-Japanese War, Japan carried out to the letter the stipulation of article 14 of the Hague Regulations. Through the intermediary of the French Embassies in Tokio and St. Petersburg, all valuables

found on the Russian dead and seized by the Japanese were handed over to the Russian Government.

<sup>2</sup> The case of enemy merchantmen seized in a belligerent's territorial waters is, of course, an exception.



## VII

## REQUISITIONS AND CONTRIBUTIONS

Vattel, III. § 165—Hall, § 140-140\*—Lawrence, § 204—Maine, p. 200—Twiss, II. § 64—Halleck, II. pp. 68-69—Taylor, §§ 538-539—Bluntschli, §§ 653-655—Heffter, § 131—Lueder in Holtzendorff, IV. pp. 500-510—Ullmann, § 155—Bonfils, Nos. 1207-1226—Pradier-Fodéré, VII. Nos. 3048-3064—Rivier, II. pp. 323-327—Calvo, IV. §§ 2231-2284—Fiore, III. Nos. 1394, 1473-1476—Martens, II. § 120—Longuet, §§ 110-114—Mérignhac, pp. 272-298—Pillet, pp. 215-235—Kriegesgebrauch, pp. 61-63—Holland, War, Nos. 75-77—Thomas, "Des réquisitions militaires" (1884)—Keller, "Requisition und Kontribution," (1898)—Pont, "Les réquisitions militaires du temps de guerre" (1905)—Risley in the "Journal of the Society of Comparative Legislation," new series, vol. II. (1900), pp. 214-223.

War must  
support  
War.

§ 146. Requisitions and contributions in war are the outcome of the eternal principle that war must support war. This principle means that every belligerent can make his enemy pay as far as possible for the continuation of the war. But this principle, though it is as old as war and will only die with war itself, has not the same effect in modern times on the actions of belligerents as it formerly had. For thousands of years belligerents used to appropriate all enemy private and public property they could get hold of, and, when the modern International Law grew up, this practice found legal sanction. But since the end of the seventeenth century this practice grew milder under the influence of the experience that the provisioning of armies in enemy territory became more or less impossible when the inhabitants were treated according to the old practice. Although belligerents retained in strict law the right to appropriate all private with all public property, it became usual to abstain from enforcing such right, and in lieu thereof to impose contributions of cash

and requisitions in kind upon the inhabitants of the invaded country.<sup>1</sup> And when this usage developed, no belligerent ever thought of paying in cash for requisitions, or giving a receipt for them. But in the nineteenth century another practice became usual. Commanders then often gave a receipt for contributions and requisitions, in order to avoid abuse and to prevent further demands by succeeding commanders for fresh contributions and requisitions without knowledge of the former impositions. And there are instances of the nineteenth century on record when belligerents paid actually in cash for all requisitions they made. The usual practice at the end of the nineteenth century was that commanders always gave a receipt for contributions, and that they either paid in cash for requisitions or acknowledged them by receipt, so that the respective inhabitants could be indemnified by their own Government after conclusion of peace. However, no restriction whatever was imposed upon commanders with regard to the amount of contributions and requisitions, and with regard to the proportion between the resources of a country and the burden imposed. The Hague Regulations have now settled the matter of contributions and requisitions in a progressive way by enacting rules which put the whole matter on a new basis. That war must support war remains a principle under these regulations also. But they are widely influenced by the demand that the enemy State as such, and not the private enemy individuals, should be made to support the war, and that only as far as the necessities of war demand it contributions and

<sup>1</sup> An excellent sketch of the contributions is given by Keller, historical development of the Requisition und Kontribution practice of requisitions and con- (1898) pp. 5-26.

requisitions should be imposed. Although certain public moveable property and the produce of public immoveables may be appropriated as heretofore, requisitions must be paid for in cash or, if this is impossible, acknowledged by receipt.

Requisi-  
tions in  
Kind and  
Quarter-  
ing.

§ 147. Requisition is the name for the demand of the supply of all kinds of articles necessary for an army either as provisions for men and horses or as clothing or as means of transport. Requisition of certain services can also be made, but they will be treated below in § 170 together with occupation, requisitions in kind only being within the scope of this section. Now, what articles can be demanded by an army cannot once for all be laid down, as they depend upon the actual need of an army. According to article 52 of the Hague Regulations, requisitions can be made from municipalities as well as from inhabitants, but they may be made as far only as they are really necessary for the army. They cannot be made by individual soldiers or officers, but only by the commander in the locality. All requisitions must be paid for in cash, and if this is impossible, they must be acknowledged by receipt, so that the municipalities or inhabitants can be indemnified later on by their Government. Apart from others, it becomes by this rule of the Hague Regulations again apparent and beyond all doubt that henceforth private enemy property is as a rule exempt from appropriation by an invading army.

A special kind of requisition is the quartering<sup>1</sup> of soldiers in the houses of private inhabitants of enemy territory, by which each inhabitant is required to supply lodging and food for a certain number of soldiers, and sometimes also stabling and forage for horses.

<sup>1</sup> See above § 143.

Although the Hague Regulations do not specially mention quartering, article 52 is nevertheless to be applied to it, since quartering is nothing else than a special kind of requisition. If cash is not paid for quartering, every inhabitant concerned must get a receipt for it, stating the number of soldiers quartered and the number of days they were catered for. It must be specially observed that, according to article 5 of the Geneva Convention, such inhabitants as entertain wounded soldiers in their houses shall be exempted<sup>1</sup> from the quartering of troops.

§ 148. Contribution is a payment in ready money demanded either from municipalities or from inhabitants, whether enemy subjects or foreign residents. Whereas formerly no general rules concerning contributions existed, articles 49 and 51 of the Hague Regulations enact now that contributions cannot be demanded extortionately, but exclusively<sup>2</sup> for the needs of the army or for the administration of the locality in question. They can be imposed by a written order of a commander-in-chief only, in contradistinction to requisitions which can be imposed by a mere commander in a locality. They cannot be imposed indiscriminately on the inhabitants, but must as far as possible be assessed upon such inhabitants in compliance with the rules in force of the respective enemy Government regarding the assessment of taxes. And, finally, for every individual contribution a receipt must be given. It is apparent that these rules of the Hague Regulations try to exclude all arbitrariness and despotism on the part of an invading enemy with regard to con-

Contributions.

<sup>1</sup> See above, § 122.

Hague Regulations. See also

<sup>2</sup> As regards contributions as a penalty, see article 50 of the Keller, l.c. pp. 60-62.

tributions, and that they try to secure to the individual contributors as well as to contributing municipalities the possibility of being indemnified afterwards by their own Government, thus shifting, as far as possible, the burden of supporting the war from private individuals and municipalities to the State proper.<sup>1</sup>

Here also, as in the case of requisitions, it must be specially observed that article 5 of the Geneva Convention enacts that inhabitants of the enemy territory who entertain wounded soldiers shall be exempted from a part of the contributions of war which may be imposed.

## VIII

### DESTRUCTION OF ENEMY PROPERTY

Grotius, III. c. 5, §§ 1-3; c. 12—Vattel, III. §§ 166-168—Hall, § 186—Lawrence, § 229—Manning, p. 186—Twiss, II. §§ 65-69—Halleck, II. pp. 63, 64, 71, 74—Taylor, §§ 481-482—Wharton, III. § 349—Wheaton, §§ 347-351—Bluntschli, §§ 649, 651, 662, 663—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 482-485—Klüber, § 262—G. F. Martens, II. § 280—Ullmann, § 149—Bonfils, No. 1078—Pradier-Fodéré, VI. Nos. 2770-2774—Rivier, II. pp. 265-268—Calvo, IV. §§ 2215-2222—Fiore, III. Nos. 1383-1388—Martens, II. § 110—Longuet, §§ 99, 100—Mérignhac, pp. 266-268—Kriegsgebrauch, pp. 52-56—Holland, War, Nos. 7 and 58 (g).

Wanton  
destruc-  
tion pro-  
hibited.

§ 149. In former times invading armies frequently used to burn and fire all enemy property they could not make use of or carry away. Afterwards, when the practice of warfare grew milder, belligerents in strict law retained the right to destroy enemy pro-

<sup>1</sup> It is strange to observe that not mention the Hague Regulations at all. Kriegsgebrauch, pp. 61-63, does

erty according to discretion, although they did, as a rule, no longer make use of such right. Nowadays, however, this right is obsolete. For in the nineteenth century it became a generally and universally recognised rule of International Law that all useless and wanton destruction of enemy property, be it public or private, is absolutely prohibited. And this rule has now expressly been enacted by article 23 (letter *g*) of the Hague Regulations, where it is categorically enacted that it is prohibited "to destroy . . . . enemy's property, unless such destruction . . . . be imperatively demanded by the necessities of war."

§ 150. All destruction and damage of enemy property in the interest of offence and defence is *necessary* destruction and damaging, and therefore lawful. It is not only permissible to destroy and damage all kinds of enemy property on the battlefield during battle, but also in preparation of battle and of expected siege. To strengthen a defensive position a house may be destroyed or damaged. To cover the retreat of an army a village on the battlefield may be fired. The district around an enemy fortress held by a belligerent may be razed, and, therefore, all private and public buildings, all vegetation may be destroyed, and all bridges blown up within a certain area. If a farm, a village, or even a town is not to be abandoned but prepared for defence, it may be necessary to commit all sorts of destruction and damage of private and public property. Further, if and where a bombardment is lawful, all destruction of property involved in it becomes likewise lawful. When a belligerent force gets hold of an enemy factory for ammunition or provisions for the enemy troops, and if it is not

Destruction for the purpose of Offence and Defence



certain that they can hold it against an attack, they may at least destroy the plant, if not the buildings. Or if a force occupies an enemy fortress, they may raze the fortifications. Even a force intrenching themselves on a battlefield may be obliged to commit destruction of all sorts.

Destruction in marching, reconnoitring, and conducting Transport.

§ 151. Destruction of enemy property in marching troops, conducting military transport, and in reconnoitring, is likewise lawful if unavoidable. A reconnoitring party need not keep on the road if they can better serve their purpose by riding across the tilled fields. And troops may be marched and transport may be conducted over crops when necessary. A humane commander will not easily allow his troops and transport to march and ride over tilled fields and crops. But if the purpose of war necessitates it he is justified in doing so.

Destruction of Arms, Ammunition, and Provisions.

§ 152. Whatever enemy property a belligerent can appropriate he can likewise destroy. To prevent the enemy from making use of them a retreating force can destroy arms, ammunition, provisions, and the like, which they have taken from the enemy or requisitioned and cannot carry away. But it must be specially observed that they cannot destroy provisions in possession of private enemy inhabitants to prevent the enemy from making future use of them.

Destruction of Historical Monuments, Works of Art, and the like.

§ 153. All destruction of and damage to historical monuments, works of art and science, buildings for charitable, educational, and religious<sup>1</sup> purposes are specially prohibited by article 56 of the Hague

<sup>1</sup> It is of importance to state the fact, that according to Grotius (III. c. 5, §§ 2 and 8), destruction of graves, churches, arms, and the like is not prohibited by the Law

of Nations, although he strongly (III. c. 12, §§ 5-7) advises to spare them unless their preservation is dangerous to the interests of the invader.

Regulations. But it must be emphasised that these objects enjoy this protection during military occupation only of enemy territory. Should a battle be waged around an historical monument in the open ground, should a church, a school or a museum be defended and attacked during military operations, these otherwise protected objects may be destroyed and damaged under the same conditions as other enemy property.

§ 154. The question must, lastly, be taken into consideration whether and under what conditions general devastation of a locality, be it a town or a larger part of enemy territory, is permitted. There cannot be the slightest doubt that such devastation is as a rule absolutely prohibited and exceptionally only permitted when, to use the words of article 23 (g) of the Hague Regulations, it is "imperatively demanded by the necessities of war." It is, however, impossible to define once for all the circumstances which make a general devastation necessary, since everything depends upon the merits of the special case. But the fact that a general devastation can be lawful must be admitted. And it is, for instance, lawful in case of a levy *en masse* on already occupied territory, when self-preservation obliges a belligerent to take refuge in the most severe measures. It is, to give another example, further lawful when, after the defeat of his main forces and occupation of his territory, an enemy disperses his remaining forces into small bands which carry on guerilla tactics and receive food and information, so that there is no hope of ending the war except by a general devastation which cuts off supplies of every kind from the guerilla bands. But it must be emphasised that only imperative necessity and the fact

General  
Devasta-  
tion.



that there is no better and less severe way open to a belligerent justify general devastation.<sup>1</sup>

Be that as it may, whenever a belligerent resorts to general devastation he ought, if possible, to make some provision for the unfortunate peaceful part of the population of the devastated tract of territory. It would be more humane to take them away into captivity instead of letting them perish on the spot. The practice, resorted to during the South African war, to house the victims of devastation in concentration camps, must be approved. The purpose of war may even oblige a belligerent to confine a population forcibly<sup>2</sup> in concentration camps.

## IX

### ASSAULT, SIEGE, AND BOMBARDMENT

Vattel, III. §§ 168-170—Hall, § 186—Halleck, II. pp. 59, 67, 185—Taylor, §§ 483-485—Bluntschli, §§ 552-554<sup>b</sup>—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 448-457—G. F. Martens, II. § 286—Ullmann, § 153—Bonfils, Nos. 1079-1087—Despagnet, Nos. 531-537—Pradier-Fodéré, VI. Nos. 2779-2786—Rivier, II. pp. 284-288—Calvo, IV. §§ 2067-2095—Fiore, III. Nos. 1322-1330—Longuet, §§ 58-59—Mérignhac, pp. 171-182—Pillet, pp. 101-112—Kriegagebrauch, pp. 18-22—Holland, War, Nos. 59-62—Rolin-Jaequemyns in R.I., II. (1870) pp. 659 and 674, III. (1871) pp. 297-307.

Assault,  
Siege, and  
Bombard-  
ment,  
when  
lawful.

§ 155. Assault is the rush of an armed force upon enemy forces in the battlefield, or upon intrenchments, fortifications, habitations, villages or towns, such rushing force committing every violence against opposing persons and destroying all impediments.

<sup>1</sup> See Hall, § 186, who gives the beginning of the nineteenth century.  
<sup>2</sup> See above, § 116.

Siege is called the surrounding and investing of an enemy locality by an armed force, cutting off those inside from all communication for the purpose of starving them into surrender or for the purpose of attacking the invested locality and taking it by assault. Bombardment is the throwing of shot and shell upon persons and things by artillery. Siege may be accompanied by bombardment and assault, but this is not necessary, since a siege may be carried out by mere investment and starvation caused thereby. Assault, siege, and bombardment are severally and jointly perfectly legitimate means of warfare.<sup>1</sup> Bombardment as well as assault, if taking place on the battlefield, need no special discussion, as they are allowed under the same circumstances and conditions as force in general is allowed. The question here is only under what circumstances assault and bombardment are allowed outside the battlefield. The answer is indirectly given by article 25 of the Hague Regulations, where it is categorically enacted that "the attack or bombardment of towns, villages, habitations, or buildings, which are not defended, is prohibited." Siege is not specially mentioned, because no belligerent would dream of besieging an undefended locality, and because siege of an undefended town would involve unjustifiable violence against enemy persons and, therefore, be unlawful. Be this as it may, the fact that now defended localities only may be bombarded, involves a decided advance on the former condition of International Law. For it was

<sup>1</sup> The assertion of some writers—see, for instance, Pillet, pp. 104-107, and Mérygnac, p. 173—that bombardment is lawful only after an unsuccessful attempt of the

besiegers to starve the besieged into surrender is not based upon a recognised rule of the Law of Nations.

formerly asserted by many writers<sup>1</sup> and military experts that, for certain reasons and purposes, undefended localities could exceptionally be bombarded also. But it must be specially observed that it matters not whether the defended locality is fortified or not, since an unfortified place can likewise be defended.<sup>2</sup> And it must be mentioned that nothing prevents a belligerent who has taken possession of an undefended fortified place from destroying the fortifications by bombardment as well as by other means.

Assault,  
how  
carried  
out.

§ 156. No special rules of International Law exist with regard to the mode of carrying out an assault. Therefore, only the general rules respecting offence and defence find application. It is in especial not<sup>3</sup> necessary to notify an assault to the authorities of the respective locality, or to request them to surrender before making an assault. That an assault may or may not be accompanied or preceded by a bombardment, need hardly be mentioned, nor that by article 28 of the Hague Regulations pillage of towns taken by assault is now expressly prohibited.

Siege, how  
carried  
out.

§ 157. With regard to the mode of carrying out siege without bombardment no special rules of International Law exist, and here too only the general rules respecting offence and defence find application. Therefore, an armed force besieging a town can, for instance, cut off the river which supplies the drinking water to the besieged, but they are not allowed to poison<sup>4</sup> such river. And it must be specially observed that no rule of law exists which obliges a besieging force to allow all non-combatants, or only women, children, the aged, the sick and wounded,

<sup>1</sup> See, for instance, Lueder in Holtzendorff, IV. p. 451.

<sup>2</sup> See Holls, *The Peace Conference at the Hague* (1900), p. 152.

<sup>3</sup> This becomes indirectly apparent from article 26 of the Hague Regulations.

<sup>4</sup> See above, § 110.

or subjects of neutral Powers, to leave the besieged locality unmolested. Although such permission<sup>1</sup> is sometimes granted, it is in most cases refused, because the fact that non-combatants are besieged together with the combatants, and that they have to endure the same hardships, may, and very often does, exercise a pressure upon the authorities to surrender.

That diplomatic envoys of neutral Powers may not be prevented from leaving a besieged town is a consequence of their extritoriality. However, if they voluntarily remain, can they claim an uncontrolled<sup>2</sup> communication with their home State by correspondence and couriers? When Mr. Washburne, the American diplomatic envoy at Paris during the siege of that city in 1870 by the Germans, claimed the right of sending a messenger with despatches to London in a sealed bag through the German lines, Count Bismarck declared that he was ready to allow foreign diplomatists in Paris to send a courier to their home States once a week, but only under the condition that their despatches were open and did not contain any remarks concerning the war. Although the United States and other Powers protested, Count Bismarck did not alter his decision. The whole question must be treated as open.<sup>3</sup>

§ 158. Regarding bombardment, article 26 of the Hague Regulations enacts that the commander of the attacking forces shall do all he can to notify his intention to resort to bombardment. But it must be emphasised that a strict duty of notification for all cases of bombardment is thereby not imposed, since

Bombardment, how carried out.

<sup>1</sup> Thus in 1870, during the Franco-German War, the German besiegers of Strassburg as well as of Belfort allowed the women, the children, and the sick to leave the besieged fortresses.

<sup>2</sup> The matter is discussed by Rolin-Jacquemyns in *B.L.*, III. (1871), pp. 371-377.

<sup>3</sup> See above, vol. I. § 399, and Wharton, I. § 97.

it is only enacted that a commander *shall do all he can* to send notification. He cannot do it when the circumstances of the case prevent him, or when the necessities of war demand an immediate bombardment. Be that as it may, the purpose of notification is to enable private individuals inside the locality to be bombarded to seek shelter for their persons and for their valuable personal property.

Article 27 of the Hague Regulations enacts the hitherto customary rule that all necessary steps must be taken to spare as far as possible all buildings devoted to religion, art, science, and charity; further, hospitals and other places where the sick and wounded are collected, provided these buildings and places are not used at the same time for military purposes. To enable the attacking forces to spare these buildings and places, the latter must be indicated by some particular signs, which must be previously notified to the attacking forces and must be visible from the far distance from which the besieging artillery carries out the bombardment.<sup>1</sup>

It must be specially observed that no legal duty exists for the attacking forces to restrict bombardment to fortifications only. On the contrary, destruction of private and public buildings through bombardment has always been and is still considered lawful, as it is one of the means to impress upon the authorities the advisability of surrender. Some writers<sup>2</sup> assert

<sup>1</sup> No siege takes place without the besieged accusing the besiegers of neglecting the rule that buildings devoted to religion, art, charity, the tending of the sick, and the like, must be spared during bombardments. The fact is that in case of a bombardment the destruction of such buildings cannot always be avoided, although the artillery of

the besiegers do not intentionally aim at them. That the forces of civilised States intentionally destroy such buildings, I cannot believe.

<sup>2</sup> See, for instance, Pillet, pp. 104-107; Bluntschli, § 554A; Mérygnac, p. 180. Vattel (III. § 169) does not deny the right to bombard the town, although he does not recommend it.

either that bombardment of the town, in contradistinction to the fortifications, is never lawful, or that it is only lawful when bombardment of the fortifications has not resulted in inducing surrender. But this opinion does not represent the actual practice of belligerents, and the Hague Regulations do not adopt it.

## X

### ESPIONAGE AND TREASON

Vattel, III. §§ 179-182—Hall, § 188—Lawrence, § 222—Phillimore, III. § 96—Halleck, I. pp. 571-575—Taylor, §§ 490 and 492—Wharton, III. § 347—Bluntschli, §§ 563-564, 628-640—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 461-467—Ullmann, § 149—Bonfile, Nos. 1100-1104—Despagnet, Nos. 539, 540, 542—Pradier-Fodéré, VI. Nos. 2762-2768—Rivier, II. pp. 282-284—Calvo, IV. §§ 2111-2122—Fiore, III. Nos. 1341, 1374-1376—Martens, II. § 116—Longuet, §§ 63-75—Mérignhac, pp. 183-209—Pillet, pp. 97-100—Kriegsgebrauch, pp. 30-31—Holland, War, Nos. 65-67—Friedemann, "Die Lage der Kriegakundschafter und Spione" (1892).

§ 159. War cannot be waged without all kinds of information about the forces and the intentions of the enemy and about the character of the country within the zone of military operations. To obtain the necessary information, it has always been considered lawful on the one hand to employ spies, and, on the other, to make use of the treason of enemy soldiers or private enemy subjects, whether they were bribed<sup>1</sup> or offered the information voluntarily and gratuitously. Article 24 of the Hague Regulations enacts the old customary rule that the employment of methods necessary to obtain information about the

Twofold  
Character  
of Espion-  
age and  
Treason.

<sup>1</sup> Some writers maintain, however, that it is not lawful to bribe enemy soldiers into espionage; see below, § 162.

enemy and the country is considered allowable. However, the fact that these methods are lawful on the part of the belligerent who employs them does not prevent the punishment of such individuals as are engaged in procuring information. Although a belligerent acts lawfully in employing spies and traitors, the other belligerent, who punishes spies and traitors, acts likewise lawfully. Indeed, espionage and treason bear a twofold character. For persons committing acts of espionage or treason are—as will be shown below in § 255—considered war criminals and may be punished, but the employment of spies and traitors is considered lawful on the part of the belligerents.

Espionage  
in contra-  
distinc-  
tion to  
Scouting  
and  
Despatch-  
bearing.

§ 160. Espionage must not be confounded, first, with scouting, and, secondly, with despatch-bearing. According to article 29 of the Hague Regulations, espionage is the act of a soldier or another individual who clandestinely, or under false pretences, seeks to obtain information in the zone of belligerent operations with the intention of communicating it to the other party. Therefore, soldiers not in disguise, who penetrate into the zone of operations of the enemy, are not spies. They are scouts who enjoy all privileges of the members of armed forces, and they must, when captured, be treated as prisoners of war. Likewise, soldiers or civilians charged with the delivery of despatches for their own army or for that of the enemy and carrying out their mission openly are not spies. And it matters not whether despatch-bearers make use of balloons or of other means of communication. Thus, a soldier or civilian trying to carry despatches from a force besieged in a fortress to other forces of the same belligerent, whether making use of a balloon or riding or walking at night time, may

not be treated as a spy. On the other hand, spying may well be carried out by despatch-bearers or by persons in a balloon, whether they make use of the balloon of a despatch-bearer or rise specially in a balloon for the purpose of spying.<sup>1</sup> The mere fact that a balloon is visible does not exclude the treatment of such persons as spies, since spying may, quite as well as clandestinely, take place under false pretences. But special care must be taken to really prove the fact of espionage in such cases, for an individual carrying despatches is *prima facie* not a spy and must not be treated as a spy until proved to be such.

A remarkable case of alleged, but not real, espionage is that of Major André, which occurred in 1780 during the American War of Independence. The American General Arnold, who was commandant of West Point, on the North River, intended to desert the Americans and to join the British forces. He opened negotiations with Sir Henry Clinton for the purpose of surrendering West Point, and Major André was commissioned by Sir Henry Clinton to make the final arrangements with Arnold. One night, meeting Arnold outside both the American and British lines, André did not return the way he came, but, after having changed his uniform for plain clothes and been furnished with a passport under the name of John Anderson by Arnold, undertook to return through the American lines. He was caught, convicted as a spy, and hanged. As André actually was not a spy, his conviction for espionage was not justified, and if such a case occurred nowadays, article 29 of the Hague Regulations would certainly prevent a conviction for espionage. Be that as it

<sup>1</sup> See below, § 356 (4), concerning wireless telegraphy.



may, George III. considered André a martyr, and honoured his memory by granting a pension to his mother and a baronetcy to his brother.<sup>1</sup>

Punish-  
ment of  
Espion-  
age.

§ 161. The usual punishment for spying is hanging or shooting, but less severe punishments are, of course, admissible and sometimes enforced. However this may be, according to article 30 of the Hague Regulations a spy cannot be punished without a trial before a court-martial. And according to article 31 of the Hague Regulations a spy who is not captured in the act but rejoins the army to which he belongs, and is subsequently captured by the enemy, cannot be punished for his previous espionage and must be treated as a prisoner of war. No regard, however, is paid to the status, rank, position, or the motive of a spy. He may be a soldier or a civilian, an officer or a private. He may be following instructions of superiors or acting on his own initiative from patriotic motives. A case of espionage, remarkable on account of the position of the spy, is that of the American Captain Nathan Hale, which occurred in 1776. After the American forces had withdrawn from Long Island, Captain Hale recrossed under disguise and obtained valuable information about the English forces that had occupied the island. But he was caught before he could rejoin his army, and he was executed as a spy.<sup>2</sup>

Treason.

§ 162. Treason may be committed by a soldier or an ordinary subject of a belligerent, but it may also be committed by an inhabitant of an occupied enemy territory or even by the subject of a neutral State transitorily staying there, and it can take place

<sup>1</sup> See Phillimore, III. § 106; Captain Jokki, which is reported as a case of espionage, but is really a case of treason, will be discussed below in § 255.

<sup>2</sup> The case of Major Jokok and

after an arrangement with the favoured belligerent or without such an arrangement. In any case a belligerent making use of treason acts lawfully, although the Hague Regulations do not mention the matter at all. But treason may be embodied in many acts of different sorts; the possible cases of treason and its punishment will be discussed below in § 255. However, although it is generally recognised that such belligerent acts lawfully as makes use of the offer of a traitor, the question is controverted<sup>1</sup> whether a belligerent acts lawfully who bribes a commander of an enemy fortress into surrender, incites enemy soldiers to desertion, bribes enemy officers for the purpose of getting important information, incites the enemy subjects to rise against the legitimate Government, and the like. If the rules of the Law of Nations are formulated, not from doctrines of book-writers, but from what is done by the belligerents in practice, it must be asserted that all such acts, ugly and immoral as they are, are not considered illegal according to the Law of Nations.

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<sup>1</sup> See Vattel, III. § 180; Heff-Longuet, § 52; Mérignhac, p. 188, ter, § 125; Taylor, § 490; Ullmann, and others. See also below, § 164. § 149 (8); Martens, II. § 110 (8);

## XI

## RUSES

Grotius, III. c. 1, §§ 6-18—Bynkershoek, *Quaest. jur. publ.* I. c. 1—Vattel, III. §§ 177-178—Hall, § 187—Lawrence, § 230—Phillimore, III. § 94—Halleck, I. pp. 566-571—Taylor, § 488—Bluntschli, §§ 565-566—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 457-461—Ullmann, § 149—Bonfilis, Nos. 1073-1075—Despagnet, No. 530—Pradier-Fodéré, VI. Nos. 2759-2761—Rivier, II. p. 261—Calvo, IV. §§ 2106-2110—Flore, III. Nos. 1334-1339—Longuet, §§ 53-56—Mérignhac, pp. 165-168—Pillet, pp. 93-97—Kriegsgebrauch, pp. 23-24—Holland, War, Nos. 63-64—Brocher in R.I., V. (1873) pp. 325-329.

Character  
of Ruses  
of War.

§ 163. Ruses of war or stratagems are deceit employed during military operations for the purpose of misleading the enemy. Such deceit is of great importance in war, and, just as belligerents are allowed to employ all methods of obtaining information, so they are, on the other hand, allowed, and article 24 of the Hague Regulations confirms this, to employ all sorts of ruses for the purpose of deceiving the enemy. Very important objects may be attained through ruses of war, as, for instance, the surrender of a force or of a fortress, the evacuation of territory held by the enemy, the withdrawal from a siege, the abandonment of an intended attack, and the like. But ruses of war are also employed, and are very often the decisive factor, during battles.

Different  
kinds of  
Strata-  
gems.

§ 164. Of ruses there are so many kinds that it is impossible to enumerate and classify them. But to illustrate what acts are done under the cloak of ruse some instances may be given. Now, it is hardly necessary to mention the laying of ambushes and traps, the masking of military operations such as marches or the erection of batteries and the like,

the feigning of attacks or flights or withdrawals, the carrying out of a surprise, and other stratagems employed every day in war. But it is important to know that, when useful, feigned signals and bugle-calls may be ordered, the watchword of the enemy may be used, deceitful intelligence may be disseminated,<sup>1</sup> the signals and the bugle-calls of the enemy may be mimicked<sup>2</sup> to mislead his forces. And even such ugly acts<sup>3</sup> as bribery of enemy commanders and officials in high position and secret seduction of enemy soldiers to desertion and of enemy subjects to insurrection, are frequently committed, although many writers protest. As regards the use of the national flag, the military ensigns, and the uniforms of the enemy, theory and practice are unanimous in rejecting it during actual attack and defence, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe. But many<sup>4</sup> publicists maintain that until the actual fighting begins belligerent forces may by way of stratagem make use of the national flag, military ensigns, and uniforms of the enemy. Article 23 (f) of the Hague Regulations does not prohibit any and every use of these symbols, but only their *improper* use, thus leaving the question open,<sup>5</sup> what use is a proper one and what not.

<sup>1</sup> See the examples quoted by Pradier-Fodéré, VI. No. 2761.

<sup>2</sup> See Pradier-Fodéré, VI. No. 2760.

<sup>3</sup> The point has been discussed above in § 162.

<sup>4</sup> See, for instance, Hall, § 187; Bluntschli, § 565; Taylor, § 488; Calvo, IV. No. 2106; Pillet, p. 95; Longuet, § 54. But, on the other hand, the number of publicists who consider it illegal to make use of the enemy flag, ensigns,

and uniforms, even before an actual attack, is daily growing; see, for instance, Lueder in Holtzendorff, IV. p. 458; Mérignhac, p. 166; Pradier-Fodéré, VI. No. 2760; Bonfils, No. 1074; Kriegsgebrauch, p. 24. As regards the use of the enemy flag on the part of men-of-war, see below, in § 211.

<sup>5</sup> Some writers maintain that article 23 (f) of the Hague Regulations has settled the controversy, but they forget that this

Those who have hitherto taught the admissibility of the use of these symbols outside actual fighting can correctly maintain that the quoted article 23 (f) does not prohibit it.<sup>1</sup>

Stratagems in contradiction to Perfidy.

§ 165. Stratagems must be carefully distinguished from perfidy, since the former are allowed, whereas the latter is prohibited. Halleck (I. p. 566) correctly formulates the distinction by laying down the principle that, whenever a belligerent has expressly or tacitly engaged and is therefore bound by a moral obligation to speak the truth to an enemy, it is perfidy to deceive the latter's confidence, because it contains a breach of good faith. Thus a flag of truce or the cross of the Geneva Convention must never be made use of for a stratagem, capitulations must be carried out to the letter, the feigning of surrender for the purpose of alluring the enemy into a trap is a treacherous act, as is the assassination of enemy commanders or soldiers or heads of States. On the other hand, stratagem may be met by stratagem, and a belligerent cannot complain of the enemy who has so deceived him. If, for instance, a spy of the

article speaks only of the *improper* use of the enemy ensigns and uniform.

<sup>1</sup> Different from the use of the enemy uniform for the purpose of deceit is the case when members of armed forces who are deficient in clothes wear the uniforms of prisoners or of the enemy dead. If this is done—and it always will be done if necessary—such distinct alterations in the uniform ought to be made as make it apparent to which side the soldiers concerned belong (see Holland, War, No. 64). Again different is the case where soldiers are through lack of clothing obliged to wear apparel of civilians, such as great-

coats, hats, and the like. Care must be taken here that the soldiers concerned do nevertheless wear a fixed distinctive emblem which marks them as soldiers, since otherwise they lose the privileges of members of the armed forces of the belligerents (see article 1, No. 2, of the Hague Regulations). During the Russo-Japanese War both belligerents repeatedly accused each other of using Chinese clothing for members of their armed forces; the soldiers concerned apparently were obliged through lack of proper clothing temporarily to make use of Chinese garments.

enemy is bribed to give deceitful intelligence to his employer, or if an officer, who is approached by the enemy and offered a bribe, accepts it feigningly but deceives the briber and leads him to disaster, no perfidy is committed.

## XII

### OCCUPATION OF ENEMY TERRITORY

Grotius, III. c. 6, § 4—Vattel, III. §§ 197-200—Hall, §§ 153-161—Lawrence, § 200-201—Maine, pp. 176-183—Halleck, II. pp. 432-466—Taylor, §§ 568-579—Wharton, III. §§ 354-355—Bluntschli, §§ 539-551—Heffter, §§ 131-132—Lueder in Holtzendorff, IV. pp. 510-524—Klüber, §§ 255-256—G. F. Martens, II. § 280—Ullmann, §§ 155-156—Bonfile, Nos. 1156-1175—Despagnet, Nos. 566-577—Pradier-Fodéré, VII. Nos. 2939-2988, 3019-3028—Rivier, II. pp. 299-306—Calvo, IV. §§ 2166-2198—Fiore, III. Nos. 1454-1481—Martens, II. §§ 117-119—Longuet, §§ 115-133—Mérignhac, pp. 241-262—Pillet, pp. 237-259—Kriegagebrauch, pp. 45-50—Holland, War, Nos. 68-74, 79-81—Waxel, "L'armée d'invasion et la population" (1874)—Litta, "L'occupazione militare" (1874)—Bernier, "De l'occupation militaire en temps de guerre" (1884)—Corai, "L'occupazione militare in tempo di guerra e le relazioni internazionali che ne derivano" (2nd edit. 1886)—Bray, "De l'occupation militaire en temps de guerre, &c." (1891)—Magoon, "Law of Civil Government under Military Occupation" (2nd edit. 1900)—Lorriot, "De la nature de l'occupation de guerre" (1903)—Rolin-Jaequemyns in R.I., II. (1870), p. 666, and III. 1871 p. 311—Löning in R.I., IV. (1872), p. 622, and V. (1873), p. 69.

§ 166. If a belligerent succeeds in occupying a part or even the whole of the enemy territory, he has realised a very important aim of warfare. He can now not only make use of the resources of the enemy country for military purposes, but can also keep it for the time being as a pledge of his military success, and thereby impress upon the enemy the necessity of submitting to terms of peace. And in

Occupation as an Aim of Warfare

regard to occupation, International Law respecting warfare has progressed more than in any other department. In former times enemy territory that was occupied by a belligerent was in every point considered his State property, with which and with the inhabitants therein he could do what he liked. He could devastate the country with fire and sword, appropriate all public and private property therein, kill the inhabitants, or take them away into captivity, or make them take an oath of allegiance. He could, even before the war was decided and his occupation was definitive, dispose of the territory by ceding it to a third State, as, for instance, happened during the Northern War (1700-1718), when in 1715 Denmark sold the occupied Swedish territories of Bremen and Verden to Hanover. That an occupant could force the inhabitants of the occupied territory to serve in his own army and to fight against their legitimate sovereign, was indubitable. Thus, during the Seven Years' War, Frederick II of Prussia repeatedly made forcible levies of thousands of recruits in Saxony, which he had occupied. But during the second half of the eighteenth century things gradually began to undergo a change. The distinction between mere temporary military occupation of territory, on the one hand, and, on the other, real acquisition of territory through conquest and subjugation, became more and more apparent, since Vattel (III. § 197) had drawn attention to it. However, it was not till long after the Napoleonic wars in the nineteenth century that the consequences of this distinction were carried to their full extent by the theory and practice of International Law. The first to do this was Heffter (§ 131), whose treatise made its appearance in 1844. And it is certain that it took the

whole of the nineteenth century to develop such rules regarding occupation as are now universally recognised and in many respects enacted by articles 42-56 of the Hague Regulations.

In so far as these rules touch upon the special treatment of persons and property of the inhabitants of and public property situated within occupied territory, they have already been taken into consideration above in §§ 107-154. What concerns us here are the rights and duties of the occupying belligerent in relation to his political administration of the territory and to his political authority over its inhabitants.<sup>1</sup> The principle underlying these modern rules is that, although the occupant does in no wise acquire sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being a military authority over it. As he prevents thereby the legitimate Sovereign from exercising his authority and claims obedience for himself from the inhabitants, he has to administrate the country not only in the interest of his own military advantage, but also, as far as possible at least, for the public benefit of the inhabitants. Thus the present International Law not only gives certain rights to an occupant, but also imposes certain duties upon him.

§ 167. Since an occupant, although his power is merely military, has certain rights and duties, the

Occupation when effected.

<sup>1</sup> Most treatises, especially all the French, treat under the heading "occupation" not only of the rights and duties of an occupant concerning the political administration of the country and the political authority over the inhabitants, but also of other matters, such as appropriation of public and private property, re-

quisitions and contributions, destruction of public and private property, violence against private enemy subjects and enemy officials. These matters have, however, nothing to do with occupation, but are better discussed in connexion with the means of land warfare; see above, §§ 107-154.



first question to deal with is, when and under what circumstances a territory must be considered occupied. Now it is certain that mere invasion is not yet occupation. A small belligerent force may raid an enemy territory without establishing any administration, but quickly rush on to some place in the interior for the purpose of reconnoitring, of destroying a bridge or dépôt of munitions and provisions, and the like, and quickly withdraw after having realised its purpose. Although it may correctly be asserted that, as long and in so far as such raiding force is in possession of a locality and sets up a temporary administration therein, it occupies this locality, yet it certainly does not occupy the whole territory, and even the occupation of such locality ceases the moment the force leaves it behind. Article 42 of the Hague Regulations enacts now that territory is considered occupied when it is actually placed under the authority of the hostile army, and that such occupation applies only to the territory where such authority is established and in a position to assert itself. This definition of occupation is not at all precise, but it is as precise as a legal definition of such kind of fact as occupation can be. If, as some publicists<sup>1</sup> maintain, only such territory were actually occupied, in which every part is held by a sufficient number of soldiers to enforce immediately and on the very spot the authority of an occupant, an effective occupation of a large territory would simply be impossible, since then not only in every town, village, and railway station, but also in every isolated habitation and hut the presence of a sufficient number of

<sup>1</sup> See, for instance, Hall, § 161. This was also the standpoint of the delegates of the smaller States at the Brussels Conference of 1874 when the Declaration of Brussels was drafted.

soldiers would be necessary. Reasonably no other conditions ought to be laid down as regards effective occupation in war than those under which in time of peace a Sovereign is able to assert his authority over a territory. What these conditions are is a question of fact which is to be answered according to the merits of the single case. If, when the legitimate Sovereign is prevented from exercising his powers, the occupant is in the position to assert his authority and actually establishes an administration over a territory, it matters not with what means and in what ways his authority is exercised. For instance, when in the centre of a territory a larger force is established from which constantly flying columns are sent round the territory, such territory is indeed effectively occupied, provided there are no enemy forces present, and, further, provided these columns can really keep the territory concerned under control.<sup>1</sup> Again, when an army is marching on through enemy territory, taking possession of the lines of communication and the open towns, surrounding the fortresses with a besieging force, and disarming the inhabitants in open places of habitation, the whole territory left behind the army is effectively occupied, provided some kind of administration is established, and further provided that, as soon as it becomes necessary to assert the authority of the occupant, a sufficient force can within reasonable time be sent to the locality affected. The conditions vary with those of the country concerned.

<sup>1</sup> This is not identical with so-called *constructive* occupation, but is really *effective* occupation. An occupation is constructive only if an invader declares districts as occupied over which he actually does not exercise control—for in-

stance, when he actually occupies only the capital of a large province, and proclaims to have thereby occupied the whole of the province, although he does not take any steps to exercise control over it.

When a vast country is thinly populated, a smaller force is necessary to occupy it, and a smaller number of centres need be garrisoned than in the case of a thickly populated country. Thus, the occupation of the former Orange Free State and the former South African Republic became effective in 1901 some time after their annexation by Great Britain and the degeneration of ordinary war into guerilla war, although only about 250,000 British soldiers had to keep up the occupation of a territory of about 500,000 square miles. The fact that all the towns and all the lines of communication were in the hands and under the administration of the British army, that the inhabitants of smaller places were taken away into concentration camps, that the enemy forces were either in captivity or routed into comparatively small guerilla bands, and finally, that wherever such bands tried to make an attack, a sufficient British force could within reasonable time make its appearance, was quite sufficient to assert British authority<sup>1</sup> over that vast territory, although it took more than a year before peace was finally established.

It must be emphasised that the rules regarding effective occupation must be formulated from the basis of actual practice quite as much as rules regarding other matters of International Law. Those rules are not authoritative which theorists lay down,

<sup>1</sup> The annexation of the Orange Free State dates from May 24, 1900, and that of the South African Republic from September 1, 1900. It may well be doubted whether at these dates the occupation of the territories concerned was already so complete as to be called effective; and the British Government ought not to have

proclaimed the annexation at such early dates. But there ought to be no doubt that the occupation became effective some time afterwards, in 1901. See, however, Sir Thomas Barclay in the *Law Quarterly Review*, XXI. (1905), p. 307, who asserts the contrary; see also, below, p. 278, note 3, and p. 279, note 1.

but those which are abstracted from actual practice of warfare unopposed by the Powers.<sup>1</sup>

§ 168. Occupation comes to an end when an occupant withdraws from a territory or is driven out of it. Thus, occupation of a territory ceases and remains only over a limited area if the forces occupying a territory are drawn into a fortress on that territory and are there besieged by the re-advancing enemy, or if the occupant concentrates his forces in a certain place of the territory, withdrawing before the re-advancing enemy. But occupation does not cease because the occupant, after having disarmed the inhabitants and having made arrangements for the administration of the country, is marching on to meet the retreating enemy, leaving only comparatively few soldiers behind.

Occupation when ended.

§ 169. As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the respective territory and its inhabitants. And all steps he takes in the exercise of this right must be recognised by the legitimate Government after occupation has ceased. This administration is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is, on the one hand, totally independent of the Constitution and the laws of the respective territory, since occupation is an aim of warfare, and since the maintenance and safety of his forces and the purpose of war stand in the foreground of his interest and must be promoted under

Rights and Duties in General of the Occupant.

<sup>1</sup> The question is so much controverted that it is impossible to enumerate the different opinions. Readers who want to study the

question must be referred to the literature quoted above at the commencement of § 166.

all circumstances and conditions. But, although regarding the safety of his army and the purpose of war the occupant is vested with an almost absolute power, he is, on the other hand, not the Sovereign of the territory, and he, therefore, has no right to make such changes of the laws and of the administration as are not temporarily necessitated by his interest in the maintenance and safety of his army and in the realisation of the purpose of war. On the contrary, he has the duty of administering the country according to the existing laws and the existing rules of administration; he must insure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty. Article 43 of the Hague Regulations enacts the following rule of fundamental importance: "The authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Rights  
of the  
Occupant  
regarding  
the In-  
habitants.

§ 170. An occupant having authority over the territory, the inhabitants, whether subjects of the enemy or of neutral States, are under his sway and have to render obedience to his commands. However, the power of the occupant over the inhabitants is not unrestricted, since he is, according to articles 44 and 45 of the Hague Regulations, prohibited from compelling them to take the oath of allegiance and to take part in military operations against their legitimate Government. On the other hand, he can compel them to take an oath of neutrality,<sup>1</sup> and can

<sup>1</sup> This means, of course, nothing but abstaining from hostilities during the time of the occupation.

punish them severely for breaking it. He can impose requisitions and contributions<sup>1</sup> upon them, can compel them to render services as guides,<sup>2</sup> drivers, farriers, and the like. He can compel them to render services for the repair or the erection of such roads, buildings, or other works as are necessary for military operations.<sup>3</sup> He can also collect the ordinary taxes, dues, and tolls imposed for the benefit of the State by the legitimate Government. But in such case he is, according to article 48 of the Hague Regulations, obliged to make the collection, as far as possible, in accordance with the rules in existence and the assessment in force, and he is, on the other hand, bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

Whoever does not comply with his commands, or commits a prohibited act, can be punished by him; but article 50 of the Hague Regulations expressly enacts the rule that *no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible*. It must, however, in face of this rule, be specially observed that it does not at all prevent<sup>4</sup> reprisals on the part of belligerents occupying enemy territory. In case acts of illegitimate warfare are committed by enemy individuals not belonging to the armed forces, reprisals may be resorted to, although practically innocent individuals are thereby punished for illegal acts for which they are neither legally nor morally responsible—for instance, when a village is burned by way of reprisals

<sup>1</sup> See above, §§ 147 and 148.

<sup>2</sup> See article 52 of the Hague Regulations.

<sup>3</sup> This is generally recognised by theory and practice; see Holland, War, No. 70.

<sup>4</sup> See Holland, War, No. 75 bis.

for a treacherous attack on enemy soldiers committed there by some unknown individuals.<sup>1</sup> Nor does this new rule prevent an occupant from taking hostages<sup>2</sup> in the interest of the safety of the line of communication threatened by guerillas not belonging to the armed forces, or for other purposes,<sup>3</sup> although the hostage must suffer for acts or omissions of others for which he is neither legally nor morally responsible.

Position  
of Govern-  
ment  
Officials  
and  
Municipal  
Function-  
aries  
during Oc-  
cupation.

§ 171. Since through occupation the authority over the territory actually passes into the hands of the occupant, he can for the time of his occupation depose all Government officials and municipal functionaries that have not withdrawn together with the retreating enemy. On the other hand, he cannot oblige them by force to administer their functions during occupation, if they refuse to do so, except where a military necessity for the administration of a certain function arises. If they are willing to serve under him, he can make them take an oath of obedience, but not of allegiance, and he cannot oblige them to administer their functions in his name, but he can prevent them from doing so in the name of the legitimate Government.<sup>4</sup> Since, according to article 43 of the Hague Regulations

<sup>1</sup> See below, § 248.

<sup>2</sup> But this is a moot point; see below, § 259.

<sup>3</sup> Belligerents sometimes take hostages for the purpose of securing compliance with contributions, requisitions, and the like. As long as such hostages obtain the same treatment as prisoners of war, the practice seems not to be illegal, although the Hague Regulations do not mention and many publicists condemn it; see above, p. 122, note 1, and below, p. 273, note 2.

<sup>4</sup> Many publicists assert that in case an occupant leaves officials of the legitimate Government in office, he "must" pay them their ordinary salaries. But I cannot see that there is a customary or conventional rule in existence concerning this point. But it is in an occupant's own interest to pay such salaries, and he will as a rule do this. Only in the case of article 48 of the Hague Regulations is he obliged to do it.

he has to secure public order and safety, he must appoint temporarily other functionaries in case those of the legitimate Government refuse to serve under him, or in case he deposes them for the time of the occupation.

§ 172. The particular position Courts of Justice have nowadays in civilised countries makes it necessary to discuss their position during occupation.<sup>1</sup> There is no doubt that an occupant can suspend the judges as well as other officials. However, if he does suspend them, he must appoint temporarily others in their place. If they are willing to serve under him, he must respect their independence according to the laws of the country. Where it is necessary, he can set up military Courts instead of the ordinary Courts. In case and in so far as he admits the administration of justice by the ordinary Courts, he can nevertheless, as far as it is necessary for military purposes or for the maintenance of public order and safety, temporarily alter the laws, especially the Criminal Law, on the basis of which justice is administered, as well as the laws regarding procedure. He has, however, no right to constrain the Courts to pronounce their verdicts in his name, although he need not allow them to pronounce verdicts in the name of the legitimate Government. As an illustration of this may serve a case that happened during the Franco-German War in September 1870 after the fall of the Emperor Napoleon and the proclamation of the French Republic, when the Court of Appeal at Nancy pronounced its verdicts under the formula "In the name of the French People and Government." Since Germany had not yet recognised the French Republic, the Germans ordered the Court

Position of  
Courts of  
Justice  
during Oc-  
cupation.

<sup>1</sup> See Petit, *L'Administration de la justice en territoire occupé* (1900).



to use the formula "In the name of the High German Powers occupying Alsace and Lorraine," but gave the Court to understand that, if the Court objected to this formula, they were disposed to admit another, and were even ready to admit the formula "In the name of the Emperor of the French," as the Emperor had not abdicated. The Court, however, refused to pronounce its verdict otherwise than "In the name of the French Government and People," and, consequently, suspended its sittings. There can be no doubt that the Germans had no right to order the formula to be used, "In the name of the High German Powers &c.," but they were certainly not obliged to admit the formula preferred by the Court; and the fact that they were disposed to admit another formula than that at first ordered ought to have made the Court accept a compromise. Bluntschli (§ 547) correctly maintains that the most natural solution of the difficulty would have been to use the neutral formula "In the name of the Law."

## CHAPTER IV

### WARFARE ON SEA

#### I

#### ON SEA WARFARE IN GENERAL

Hall, § 147—Lawrence, §§ 216-217—Maine, pp. 117-122—Manning, pp. 183-184—Phillimore, III. § 347—Twiss, II. § 73—Halleck, II. pp. 80-82—Taylor, § 547—Wharton, III. §§ 342-345—Wheaton, § 355—Bluntschli, §§ 665-667—Heffter, § 139—Geffcken in Holtzendorff, IV. pp. 547-548, 571-581—Ullmann, §§ 159-160—Bonfilis, Nos. 1268, 1294-1338—Despagnet, Nos. 638-645—Rivier, II. pp. 329-335—Calvo, IV. §§ 2123, 2379-2410—Fiore, III. Nos. 1399-1413—Pillet, pp. 118-120—Perals, § 36—Testa, pp. 147-157—Boeck, Nos. 3-153—Lawrence, *Essays*, pp. 278-306—Westlake, *Chapters*, pp. 245-253—Ortolan, I. pp. 35-50—Hautefeuille, I. pp. 161-167—Gessner, Westlake, Lorimer, Rolin-Jaequemyns, Laveleye, Albéric Rolin, and Pierantoni in R.I., VII. (1875), pp. 256-272 and 558-656—Twiss, in R.I., XVI. (1884), pp. 113-137.—See also the authors quoted below, p. 186, note 2.

§ 173. The purpose of war is the same in warfare both on land and on sea—namely, the overpowering of the enemy. But sea warfare serves this purpose by attempting the accomplishment of aims which are different from those of land warfare. Whereas the aims of land warfare are defeat of the enemy army and occupation of the enemy territory, the aims<sup>1</sup> of sea warfare are: defeat of the enemy navy; annihilation of the enemy merchant fleet; destruction of enemy coast fortifications, and of maritime as well as

Aims and  
Means of  
Sea  
Warfare

<sup>1</sup> Aims of sea warfare must not be confounded with ends of war; see above, § 66.

military establishments on the enemy coast ; cutting off intercourse with the enemy coast ; prevention of carriage of contraband and analogous of contraband to the enemy ; all kinds of support to military operations on land, such as protection of a landing of troops on the enemy coast ; and, lastly, defence of the home coast and protection to the home merchant fleet.<sup>1</sup> The means through which belligerents in sea warfare endeavour to realise these aims are : attack on and seizure of enemy vessels, violence against enemy individuals, appropriation and destruction of enemy vessels and their goods, requisitions and contributions, bombardment of the enemy coast, cutting of submarine cables, blockade, espionage, treason, ruses, capture of neutral vessels carrying contraband and analogous of contraband.

Lawful  
and  
Unlawful  
Practices  
of Sea  
Warfare.

§ 174. As regards means of sea warfare, just as regards means of land warfare, it must be emphasised that not every practice capable of injuring the enemy in offence and defence is lawful. Although no regulations regarding the laws of war on sea have as yet been enacted by a general law-making treaty as a pendant to the Hague Regulations, there are customary rules of International Law in existence that regulate this matter.<sup>2</sup> These rules are in many points identical with, but in many respects differ from, the rules in force regarding warfare on land. Accordingly, the means of sea warfare must be discussed singly in the following

<sup>1</sup> Article 1 of the U.S. Naval War Code enumerates the following as aims of sea warfare :— The capture or destruction of the military and naval forces of the enemy, of his fortifications, arsenals, dry docks, and dock-yards, of his various military and naval establishments, and of his maritime commerce ; to prevent

his procuring war material from neutral sources ; to aid and assist military operations on land ; to protect and defend the national territory, property, and sea-borne commerce.

<sup>2</sup> A point not regulated is the use of floating mines ; see below, § 182.

sections. But blockade and capture of vessels carrying contraband and analogous of contraband, although they are means of warfare against an enemy, are of such importance as regards neutral trade that they will be discussed below in Part III. §§ 368-413.

§ 175. Whereas the objects against which means of land warfare may be directed are innumerable, the circle of the objects against which means of sea warfare are directed is very narrow, comprising six objects only. The chief object is enemy vessels, whether public or private. The next is enemy individuals, with distinction between those taking part in fighting and others. The third is enemy goods on enemy vessels. The fourth is the enemy coast. The fifth and sixth are neutral vessels attempting to break blockade and carrying contraband and analogous of contraband.

Objects of  
the Means  
of Sea  
Warfare.

§ 176. It is evident that in those times when a belligerent could destroy all public and private enemy property he could get hold of, no special rule existed regarding private enemy ships and private enemy property carried by them on the sea. But the practice of sea warfare went frequently beyond the limits of even so wide a right, treating neutral goods on enemy ships like enemy goods and treating neutral ships carrying enemy goods like enemy ships. It was not before the time of the *Consolato del Mare* in the fourteenth century that a set of clear and definite rules with regard to enemy private vessels and enemy private property on sea in contradistinction to neutral ships and neutral goods was adopted. According to this famous collection of maritime usages observed by the communities of the Mediterranean, there is no doubt that a belligerent can seize and appropriate all enemy private ships and goods. But a distinction

Develop-  
ment of  
Inter-  
national  
Law  
regarding  
Private  
Property  
on Sea.

is made in case of either ship or goods being neutral. Although an enemy ship can always be appropriated, neutral goods thereon have to be restored to the neutral owners. On the other hand, enemy goods on neutral ships may be appropriated, but such neutral ships must be restored to their owners. / However, these rules of the *Consolato del Mare* were not at all generally recognised, although they were adopted by several treaties between single States during the fourteenth and fifteenth centuries. Neither the communities belonging to the Hanseatic League, nor the Netherlands and Spain during the War of Independence, nor England and Spain during their wars in the sixteenth century, adopted these rules. And France expressly enacted by Ordinances of 1543 (article 42) and 1583 (article 69) that neutral goods on enemy ships as well as neutral ships carrying enemy goods should be appropriated.<sup>1</sup> Although France adopted in 1650 the rules of the *Consolato del Mare*, Louis XIV. dropped them again by the Ordinance of 1681 and re-enacted that neutral goods on enemy ships and neutral ships carrying enemy goods should be appropriated. Spain enacted the same rules in 1718. The Netherlands, in contradistinction to the *Consolato del Mare*, endeavoured by a number of treaties to foster the principle that the flag covers the goods, so that enemy goods on neutral vessels were exempt from, whereas neutral goods on enemy vessels were submitted to, appropriation. On the other hand, throughout the eighteenth and during the nineteenth century down to the beginning of the Crimean War in 1854, England adhered to the rules of the *Consolato del Mare*. Thus, no general rules of International

<sup>1</sup> *Robe d'ennemy confisque celle d'amy. Confiscantur ex navibus res, ex rebus naves.*

Law regarding private property on sea were in existence.<sup>1</sup> Matters were made worse by privateering, which was generally recognised as lawful, and by the fact that belligerents frequently declared a coast blockaded without having a sufficient number of men-of-war on the spot to make the blockade effective. It was not before the Declaration of Paris in 1856 that general rules of International Law regarding private property on sea came into existence.

§ 177. Things began to undergo a change with the outbreak of the Crimean War in 1854, when all the belligerents proclaimed that they would not issue Letters of Marque, and when, further, Great Britain declared that she would not seize enemy goods on neutral vessels, and when, thirdly, France declared that she would not appropriate neutral goods on enemy vessels. Although this alteration of attitude on the part of the belligerents was originally intended for the Crimean War only and exceptionally, it led after the conclusion of peace in 1856 to the famous and epoch-making Declaration of Paris,<sup>2</sup> which enacted the four rules—(1) that privateering is abolished, (2) that the neutral flag covers enemy's goods with the exception of contraband of war, (3) that neutral goods, contraband of war excepted, are not liable to capture under enemy's flag, (4) that blockades, in order to be binding, must be effective, which means maintained by a force sufficient really to prevent access to the coast of the enemy. Since, with the exception of a few States such as Spain, the United States of America, Mexico, Venezuela, Bolivia, and Uruguay, all members of the Family of Nations are now parties to

Declara-  
tion of  
Paris.

<sup>1</sup> Boeck, Nos. 3-103, and Geff-  
cken in Holtzendorff, IV. pp. 572-  
578, give excellent summaries of  
the facts.

<sup>2</sup> See Martens, N.R.G., XV.  
p. 767, and above, vol. I. § 559.  
See also Gibson Bowles, The De-  
claration of Paris of 1856 (1900).

the Declaration of Paris, it may well be maintained that the quoted rules are general International Law, the more so as the non-signatory Powers have hitherto in practice always acted in accordance with those rules.<sup>1</sup>

The Principle of Appropriation of Private Enemy Vessels and Enemy Goods thereon.

§ 178. But the Declaration of Paris has not touched upon the old rule that private enemy vessels and private enemy goods thereon may be seized and appropriated, and this rule is, therefore, as valid as ever heretofore. On the other hand, there is a daily increasing agitation for the abrogation of this rule. Already in 1785 Prussia and the United States of America stipulated by article 23 of their Treaty of Friendship<sup>2</sup> that in case of war between the parties each other's merchantmen shall not be seized and appropriated. Again, in 1871 the United States and Italy, by article 12 of their Treaty of Commerce,<sup>3</sup> stipulated that in case of war between the parties each other's merchantmen, with the exception of those carrying contraband of war or attempting to break a blockade, shall not be seized and appropriated. Already in 1823 the United States made the proposal to Great Britain, France, and Russia<sup>4</sup> for a treaty abrogating the rule that enemy merchantmen and enemy goods thereon can be appropriated; but Russia alone accepted the proposal under the condition that all other naval Powers should consent. Again, in 1856,<sup>5</sup> on the occasion of the Declaration of Paris, the

<sup>1</sup> That there is an agitation for the abolition of the Declaration of Paris has been mentioned above on p. 93, note 2.

<sup>2</sup> Martens, R., IV. p. 37. Perels (p. 198) maintains that this article has not been adopted by the Treaty of Commerce between Prussia and the United States of May 1, 1828; but this statement

is incorrect, for article 12 of this treaty—see Martens, N.R., VII. p. 615—adopts it expressly.

<sup>3</sup> See Martens, N.R.G., 2nd ser. I. p. 57.

<sup>4</sup> See Wharton, III. § 342, pp. 260-261.

<sup>5</sup> See Wharton, III. § 342, pp. 270-287.

United States endeavoured to obtain the victory of the principle that enemy merchantmen shall not be appropriated, making it a condition of their accession to the Declaration of Paris that this principle should be recognised. But again the attempt failed owing to the opposition of Great Britain.

At the outbreak of war in 1866, Prussia and Austria expressly declared that they would not seize and appropriate each other's merchantmen. At the outbreak of the Franco-German War in 1870, Germany declared French merchantmen exempt from capture, but she changed her attitude when France did not act upon the same lines. It should also be mentioned that already in 1865 Italy, by article 211 of her Marine Code, enacted that, in case of war with any other State, enemy merchantmen not carrying contraband of war or breaking a blockade shall not be seized and appropriated, provided reciprocity is granted. And it should further be mentioned that the United States of America made a last attempt<sup>1</sup> to secure immunity from capture to enemy merchantmen and goods on sea at the Hague Peace Conference.

It cannot be denied that, as the matter stands, it was the opposition of Great Britain which has prevented the abolition of the rule that private enemy vessels and goods may be captured. Public opinion in this country is not prepared to consent to the abolition of this rule. And there is no doubt that the abolition of the rule would involve a certain amount of danger to a country like Great Britain, whose position and power depend chiefly upon the navy. The possibility of annihilating an enemy's commerce by annihilating his merchant fleet is a powerful weapon in the hands of a great naval Power.

<sup>1</sup> See Holls, *The Peace Conference at the Hague*, pp. 306-321.



Moreover, if enemy merchantmen are not captured, they may be fitted out as cruisers, or at least be made use of for the purpose of transport of troops, munitions, and provisions. Have not several maritime States made arrangements with their steamship companies which secure the building of their Transatlantic liners on the basis of plans which make these merchantmen easily alterable into men-of-war?<sup>1</sup> And cannot sailors of merchantmen be enrolled in the navy? The argument that it is unjust that private enemy citizens should suffer through having their property seized has no weight in face of the probability that fear of the annihilation of its merchant fleet in case of war may well deter a State intending to go to war from doing so. It is a matter for politicians, not for jurists, to decide the question whether Great Britain must in the interest of self-preservation oppose the abolition of the rule that sea-borne private enemy property can be confiscated. But it is beyond all doubt that the abolition of this rule cannot be forced upon Great Britain. And many signs portend a gradual change in the opinion of the Continental writers on International Law. Whereas formerly Continental opinion was nearly unanimous in postulating the abolition of the rule, the number of those is increasing who defend its preservation.<sup>2</sup>

<sup>1</sup> See above, § 84.

<sup>2</sup> See, for instance, Perels, § 36, pp. 195-198; Röpke, *Das Seebeute-recht* (1904), pp. 36-47; Dupuis, Nos. 29-31. On the other hand, the Institute of International Law has several times voted in favour of the abolition of the rule; see *Tableau Général de l'Institut de droit International* (1893), pp. 190-193. The literature concerning the question of confiscation of

private enemy property on sea is abundant. The following authors, besides those already quoted above at the commencement of § 173, may be mentioned:—Upton, *The Law of Nations affecting Commerce during War* (1863); Cauchy, *Du respect de la propriété privée dans la guerre maritime* (1866); Vidari, *Del rispetto della proprietà privata fra gli stati in guerra* (1867);

§ 179. Be that as it may, the time is not very far distant when the Powers will perforce come to an agreement on this as on other points of sea warfare in a code of regulations regarding sea warfare as a pendant to the Hague Regulations regarding warfare on land. An initiative step has already been taken by the United States of America through her Naval War Code<sup>1</sup> published in 1900, although she afterwards withdrew<sup>2</sup> it in 1904. Other States will no doubt follow her lead. It will then be comparatively easy for them to compromise upon a common code of regulations. The interests of neutrals in a maritime war make such a common code an urgent necessity.

Impending Codification of Law of Sea Warfare.

## II

### ATTACK AND SEIZURE OF ENEMY VESSELS

Hall, §§ 138 and 148—Lawrence, §§ 205-206—Phillimore, III. § 347—Twiss, II. § 73—Halleck, II. pp. 105-108—Taylor, §§ 545-546—Walker, § 50, p. 147—Wharton, III. § 345—Bluntschli, §§ 664-670—Heffter, §§ 137-139—Bonfils, Nos. 1269-1271, 1350-1354, 1398-1400—Despagnet, Nos. 650-656—Rivier, § 66—Calvo, IV. §§ 2368-2378—Fiore, III. Nos. 1414-1424—Pillet, pp. 120-128—Perels, § 35—Testa, pp. 155-157—Lawrence, War, pp. 48-55, 93-111—Ortolan, II. pp. 31-34—Boeck, Nos. 190-208—Dupuis, Nos. 150-158—U.S. Naval War Code, articles 13-16.

§ 180. Whereas in land warfare all sorts of violence against enemy individuals are the chief

Importance of Attack and

Gessner, *Zur Reform des Kriegeserechts* (1875); Klobukowski, *Die Seebeute oder das feindliche Privateigentum zur See* (1877); Bluntschli, *Das Beuterecht im Kriege und das Seebeuterecht insbesondere* (1878); Boeck, *De la propriété privée ennemie sous pavillon ennemi* (1882); Dupuis, *La guerre maritime et les doctrines anglaises*

(1899); Leroy, *La guerre maritime* (1900); Röpeke, *Das Seebeuterecht* (1904). See also the literature quoted by Bonfils, No. 1281, and Boeck, Nos. 382-572, where the arguments of the authors against and in favour of the present practice are discussed.

<sup>1</sup> See above, vol. I. § 32.

<sup>2</sup> See above, p. 78, note 1.

Seizure of  
Enemy  
Vessels.

means, in sea warfare attack and seizure of enemy vessels are the most important means. For together with enemy vessels a belligerent gets hold of the enemy individuals and enemy goods thereon, so that he can appropriate vessels and goods as well as retain those enemy individuals who belong to the enemy armed forces as prisoners of war. For this reason violence against enemy persons and the other means of sea warfare play only a secondary part compared with attack and seizure of enemy vessels. On the other hand, such part is not at all unimportant. For a weak naval Power may even restrict the operations of her fleet to mere coast defence, and thus totally refrain from directly attacking and seizing enemy vessels.

Attack  
when  
legitimate.

§ 181. All enemy men-of-war and other public vessels, which are met by a belligerent's men-of-war on the High Seas and within the territorial waters of either belligerent, can at once be attacked, and the attacked vessel can, of course, defend herself by a counter-attack. Enemy merchantmen can be attacked only if they refuse to submit to visit after having been duly signalled to do so. And no duty exists for an enemy merchantman to submit to visit; on the contrary, she can refuse it, and defend herself against an attack. But only a man-of-war is competent to attack men-of-war as well as merchantmen, provided the war takes place between parties to the Declaration of Paris, so that privateering is prohibited. || Any merchantman of a belligerent attacking an enemy merchantman would be considered and treated as a pirate. However, if once attacked by an enemy vessel, a merchantman is competent to deliver a counter-attack and need not discontinue her attack because the vessel that opened hostilities takes to flight, but can pursue and seize her. And it must be

specially observed that an attack upon enemy vessels on the sea can also be made from forces on the shore. This is, for instance, done when coast batteries fire upon an enemy man-of-war within reach of their guns.

§ 182. One mode of attack—namely, boarding and fighting the crew—which was in use at the time of sailing ships, and which may be described as a parallel to assault in land warfare, is now no longer made use of, although, if an instance occurred, it would be perfectly lawful. Attack is nowadays effected by cannonade, torpedoes, and, if opportunity arises, by ramming. Attack on merchantmen will, of course, regularly be made by cannonade only, as the attacking vessel aims at seizing her on account of her value. But, in case the attacked vessel not only takes to flight, but defends herself by a counter-attack, all modes of attack are lawful against her, just as she herself is justified in applying all modes of attack by way of defence.

Attack  
how  
effected.

A new mode of attack which requires special attention<sup>1</sup> is that through floating mechanical in contradistinction to so-called electro-contact mines. The latter need not specially be discussed, because they are connected with a battery on land, can naturally only be laid within territorial waters, and present no danger to neutral shipping except on the spot where they are laid. But floating mechanical mines can naturally be dropped as well in the Open Sea as in territorial waters; they can, moreover, drift away from the spot where they were dropped to any distance and thus become a great danger to navigation in general. Mechanical mines were first used by both parties in the Russo-Japanese War during the

<sup>1</sup> See Lawrence, War, pp. 93- a Maritime War (1905), pp. 7-8;  
111; Holland, Neutral Duties in Bonfile, No. 1273.

blockade of Port Arthur in 1904, and the question of their admissibility was at once raised in the press of all neutral countries. A mere literal application of the existing rules of International Law concerning the means of warfare would lead to the conviction that such floating mechanical mines can be made use of without restriction, for the Open Sea as well as the territorial waters of both belligerents belong to the region of war. But such a literal interpretation of the law would, I am convinced, meet with the opposition of the whole civilised world. It is true that neutral shipping near the theatre of war on the Open Sea as well as in the territorial waters of both belligerents is exposed to many risks and dangers indirectly resulting from the operations of warfare. But the dangers of ordinary operations in sea warfare are confined to the locality where these operations take place, whereas floating mines may drift hundreds of miles, and carry a great danger far away from the theatre of war. The matter ought to be regulated in the following way:—Every belligerent is allowed to drop floating mechanical mines inside his own or the territorial waters of the enemy, provided warning is given to neutrals to avoid the waters concerned. On the Open Sea no dropping of such mines is allowed except inside a line of blockade. In any case, all floating mines must be properly moored, so as to prevent, as far as possible, their drifting away. Under no circumstances and conditions is it allowed to set floating mines adrift.

Duty of  
giving  
Quarter.

§ 183. As soon as an attacked or counter-attacked vessel hauls down her flag and, therefore, signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue an attack although she is ready to surrender and to

sink her and her crew would contain a violation of customary International Law, and would only exceptionally be admissible in case of imperative necessity or of reprisals.

§ 184. Seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board the captured vessel. But if this is for any reason impracticable, the captor orders the captured vessel to lower her flag and to steer according to his orders. Seizure.

§ 185. The effect of seizure is different with regard to private enemy vessels, on the one hand, and, on the other, to public vessels. Seizure of *private* enemy vessels may be described as a parallel to occupation of enemy territory in land warfare. Since the vessel and the individuals and goods thereon are actually placed under the captor's authority, her officers and crew become prisoners of war, and any private individuals on board are for the time being submitted to the discipline of the captor, just as private individuals on occupied enemy territory are submitted to the authority of the occupant.<sup>1</sup> Effect of Seizure. Seizure of private enemy vessels, although the capture is always made with the intention of appropriating the vessel and her enemy goods, does, however, not vest the property finally in the hands of the belligerent whose forces effected the capture. The prize has to be brought before a Prize Court, and it is the latter's confirmation of the capture through adjudication of the prize which makes the appropriation final for the capturing belligerent.<sup>2</sup>

On the other hand, the effect of seizure of *public* enemy vessels is their immediate and final appropriation. They may be either taken away into a port or

<sup>1</sup> See U.S. Naval War Code, article 11.

<sup>2</sup> See below, § 192.

at once destroyed. All individuals on board become prisoners of war, although, if there should be perchance on board a mere private enemy individual of no importance, he would probably not be kept for long in captivity, but liberated in due time. As regards goods on captured public enemy vessels, there is no doubt that the effect of seizure is at once the final appropriation of such goods on the vessels concerned as are enemy property, and they may therefore at once be destroyed, if convenient. Should, however, neutral goods be on board a captured enemy public vessel, it is a moot point whether or not they share the fate of the captured ship. According to British practice they do, but according to American practice they do not.<sup>1</sup>

Immunity  
of Vessels  
of Dis-  
covery and  
Explora-  
tion.

§ 186. According to a general international usage enemy vessels engaged in scientific discovery and exploration are granted immunity from attack and seizure in so far and so long as they themselves abstain from hostilities. The usage grew up in the the eighteenth century. In 1766, the French explorer Bougainville, who started from St. Malo with the vessels "La Boudeuse" and "L'Etoile" on a voyage round the world, was furnished by the British Government with safe-conducts. In 1776, Captain Cook's vessels "Resolution" and "Discovery," sailing from Plymouth for the purpose of exploring the Pacific Ocean, were declared exempt from attack and seizure on the part of French cruisers by the French Government. Again, the French Count Lapérouse, who started on a voyage of exploration in 1785 with the vessels "Astrolabe" and "Boussole," was secured immunity from attack and seizure. During the nineteenth century this usage became quite

<sup>1</sup> See below, p. 405, note 2.

general, and has now almost ripened into a custom; examples are the Austrian cruiser "Novara" (1859), and the Swedish cruiser "Vega" (1878). It must be specially observed that it matters not whether the vessel concerned is a private or a public vessel.<sup>1</sup>

§ 187. According to a general custom, which is, however, not recognised by Great Britain, coast fishing-boats, in contradistinction to boats engaged in deep-sea fisheries, are granted immunity from attack and seizure as long and in so far as they are unarmed and are innocently employed in catching and bringing in fish.<sup>2</sup> Already in the sixteenth century treaties were concluded between single States stipulating such immunity to each other's fishing-boats for the time of war. But throughout the seventeenth and eighteenth centuries there are instances enough of a contrary practice, and Lord Stowell refused<sup>3</sup> to recognise in strict law any such exemption, although he recognised a rule of comity to that extent. Great Britain has hitherto always taken the standpoint that any immunity granted by her to fishing-boats was a relaxation<sup>4</sup> of strict right in the interest of humanity, but revocable at any moment, and that her cruisers were justified in seizing enemy fishing boats unless prevented therefrom by special instructions on the part of the Admiralty.<sup>5</sup> It ought not, therefore, to be maintained that immunity of fishing-boats is granted by

Immunity  
of Fish-  
ing-boats.

<sup>1</sup> See U.S. Naval War Code, article 13. The matter is discussed at some length by Kleen, II. § 210, pp. 503-505. Concerning the case of the English explorer Flinders, who sailed with the vessel Investigator from England, but exchanged her for the Cumberland, which was seized in 1803 by the French at Port Louis, in Mauritius, as she

was not the vessel to which a safe-conduct was given, see Lawrence, § 105.

<sup>2</sup> The Paquette Habana, 175, United States, 677. See U.S. Naval War Code, article 14; Japanese Prize Law, article 3 (1).

<sup>3</sup> Young Jacob and Joanna, 1 Rob. 20.

<sup>4</sup> See Hall, § 148.

<sup>5</sup> See Holland, Prize Law, § 36.



a rule of universal International Law. And it must be specially observed that boats engaged in deep-sea fisheries are not exempt from capture even according to the practice of those States which grant immunity to coast fishing-boats.

Immunity  
of Mer-  
chantmen  
at the  
Outbreak  
of War  
on their  
Voyage to  
and from  
a Belli-  
gerent's  
Port.

§ 188. During the nineteenth century belligerents have several times at the outbreak of war decreed that enemy merchantmen, which were on their voyage to one of the former's ports at the outbreak of war, should not be attacked and seized during the period of their voyage to and from such port. Thus, at the outbreak of the Crimean War, Great Britain and France decreed such immunity for Russian vessels, Germany did the same with regard to French vessels in 1870,<sup>1</sup> Russia with regard to Turkish vessels in 1877, the United States with regard to Spanish vessels in 1898, Russia and Japan with regard to each other's vessels in 1904. But there is no rule of International Law which obliges a belligerent to grant such days of grace, and it is probable that in future wars days of grace will not at all be granted. The reason is that the steamboats of many countries are now built, according to an arrangement with the Government of their home State, on special designs which make them easily alterable into cruisers, and that a belligerent fleet can nowadays not for long remain effective without being accompanied by a train of transport-vessels, colliers, repairing-vessels, and the like.<sup>2</sup>

Vessels in  
Distress.

§ 189. Some instances have occurred when enemy vessels which were forced by stress of weather to seek refuge in a belligerent's harbour were granted

<sup>1</sup> See, however, above, p. 185.

<sup>2</sup> This point is ably argued by Lawrence, War, pp. 54-55.

*Port  
must  
be  
granted  
what if it is  
taken up  
space.*

exemption from seizure.<sup>1</sup> Thus, when in 1746, during war with Spain, the "Elisabeth," a British man-of-war, was forced to take refuge in the port of Havanna, she was not seized, but was offered facility for repairing damages and furnished with a safe-conduct as far as the Bermudas. Thus, further, when in 1799, during war with France, the "Diana," a Prussian merchantman, was forced to take refuge in the port of Dunkirk and seized, she was restored by the French Prize Court. But all these and other cases have not created any rule of International Law granting immunity from attack and seizure to vessels in distress, and no such rule is likely to grow up, especially not as regards men-of-war.

§ 190. According to the Hague Convention, which adapted the principles of the Geneva Convention to warfare on sea, hospital ships are inviolable, and may therefore be neither attacked nor seized; see below in §§ 204-209. Concerning the immunity of cartel ships, see below in § 225.

Immunity  
of Hos-  
pital and  
Cartel  
Ships.

§ 191. No general rule of International Law exists granting enemy mail-boats immunity from attack and seizure, but the single States have frequently stipulated such immunity in the case of war by special treaties.<sup>2</sup> Thus, for instance, Great Britain and France have, by article 13 of the Convention of London of 1833,<sup>3</sup> stipulated that all mail-boats between Great Britain and France shall continue navigation in time of war between the parties until special notice is given by either of the parties that the service is to be discontinued, and that before such notice the mail-boats shall enjoy immunity from attack and seizure.

Immunity  
of Mail-  
boats.

<sup>1</sup> See Ortolan, II. pp. 286-291, 505-507.

Kleen, II. § 210, pp. 492-494.

<sup>2</sup> See Martens, N.R., XIII

<sup>3</sup> See Kleen, II. § 210, pp. p. 105.

## III

APPROPRIATION AND DESTRUCTION OF ENEMY  
MERCHANTMEN

Hall, §§ 149-152, 171, 269—Lawrence, §§ 206-209—Phillimore, III. §§ 345-381—Twiss, II. §§ 72-97—Halleck, II. pp. 362-431, 510-526—Taylor, §§ 552-567—Wharton, III. § 345—Wheaton §§ 355-394—Bluntschli, §§ 672-673—Heffter, §§ 137-138—Geffcken in Holtzendorff, IV. pp. 588-596—Ullmann, § 161—Bonfils, Nos. 1396-1440—Despagnet, Nos. 657-670—Rivier, II. § 66—Calvo, IV. §§ 2294-2366, V. §§ 3004-3034—Fiore, III. Nos. 1426-1443—Martens, II. §§ 125-126—Pillet, pp. 342-352—Perels, §§ 36, 55-58—Testa, pp. 147-160—Valin, "*Traité des prises*," 2 vols. (1758-60), and "*Commentaire sur l'ordonnance de 1681*," 2 vols. (1766)—Pistoye et Duverdy, "*Traité des prises maritimes*," 2 vols. (1855)—Upton, "*The Law of Nations affecting Commerce during War*" (1863)—Boeck, Nos. 156-209, 329-380—Dupuis, Nos. 96-149, 282-301. See also the literature quoted by Bonfils at the commencement of No. 1396.

Prize  
Courts.

§ 192. It has already been stated above, in § 185, that the capture of an enemy private vessel has to be confirmed by a Prize Court, and that it is only through the latter's adjudication that the vessel becomes finally appropriated. The origin<sup>1</sup> of Prize Courts is to be traced back to the end of the Middle Ages. During the Middle Ages, after the Roman Empire had broken up, a state of lawlessness established itself on the High Seas. Piratical vessels of the Danes covered the North Sea and the Baltic, and navigation of the Mediterranean Sea was threatened by Greek and Saracen pirates. Merchantmen, therefore, associated themselves for mutual protection and sailed as a merchant fleet under a specially elected chief, the so-called admiral. They also occasionally sent out a fleet of armed vessels for the purpose of sweeping pirates from certain parts of

<sup>1</sup> I follow the excellent summary of the facts given by Twiss, II. §§ 74-75.

the High Seas. Piratical vessels and goods which were captured were divided among the captors according to a decision of their admiral. During the thirteenth century the maritime States of Europe endeavoured to keep order on the Open Sea themselves. By-and-by armed vessels were obliged to be furnished with Letters Patent or Letters of Marque from the Sovereign of a maritime State, and their captures submitted to an official control of such State as had furnished them with their letters. A board, called the Admiralty, was instituted by maritime States, and officers of that Board of Admiralty exercised control over the armed vessels and their captures, inquiring in each case into the legitimation of the captor and the nationality of the captured vessel and her goods. And when modern International Law had grown up, it was a recognised customary rule that in time of war the Admiralty of maritime belligerents should be obliged to institute a Court or Courts for the purpose of deciding in each case of a prize captured by public vessels or privateers the question whether the capture was lawful or not. These Courts were called Prize Courts. This institution has come down to our times, and nowadays all maritime States either constitute permanent Prize Courts, or appoint them specially in each case of an outbreak of war. The whole institution is essentially one in the interest of neutrals, since belligerents want to be guarded by a decision of a Court against claims of neutral States regarding alleged unjustified capture of neutral vessels and goods. The capture of any private vessel, whether *prima facie* belonging to an enemy or a neutral, must, therefore, be submitted to a Prize Court. But it must be emphasised that Prize Courts are not International Courts, but National Courts instituted by

Municipal Law, and that the law they administer is Municipal Law,<sup>1</sup> based on custom, statutes, or special regulations of their State. Every State is bound by International Law to enact only such statutes and regulations<sup>2</sup> for its Prize Courts as agree with International Law. A State may, therefore, instead of special regulations, directly order its Prize Courts to apply the rules of International Law, and it is understood that, when no statutes are enacted or regulations are given, Prize Courts have to apply International Law. Prize Courts may be instituted by belligerents in any part of their territory or the territories of allies, but not on neutral territory. It would nowadays constitute a breach of neutrality on the part of a neutral State to allow the institution on its territory of a Prize Court.<sup>3</sup>

Conduct  
of Prize to  
port of  
Prize  
Court.

§ 193. As soon as a vessel is seized she must be conducted to a port where a Prize Court is sitting. As a rule the officer and the crew sent on board the prize by the captor will navigate the prize to the port. This officer can ask the master and crew of the vessel to assist him, but, if they refuse, they cannot be compelled thereto. The captor need not accompany the prize to the port. In the exceptional case, however, where an officer and crew cannot be sent on board and the captured vessel is ordered to lower her flag and to steer according to orders, the captor must conduct the prize to the port. To which port a prize is to be taken is not for International Law to

<sup>1</sup> See below, § 434.

<sup>2</sup> The constitution and procedure of Prize Courts in Great Britain are settled by the Naval Prize Act, 1864 (27 and 28 Vict. ch. 25), and the Prize Courts Act, 1894 (57 and 58 Vict. ch. 39). It should be mentioned that the Institute of International

Law has in various meetings occupied itself with the whole matter of capture, and adopted a body of rules in the 'Règlement international des Prises Maritimes,' which represent a code of Prize Law; see *Annuaire*, IX. pp. 218-243, but also XVI. pp. 44 and 311.

<sup>3</sup> See below § 327.

determine ; the latter says only that the prize must be taken straight to a port of a Prize Court, and only in case of distress or necessity is delay allowed. If the neutral State concerned gives the permission, the prize may, in case of distress or in case she is in such bad condition as prevents her from being taken to a port of a Prize Court, be taken to a near neutral port, and, if admitted, the capturing man-of-war as well as the prize enjoy there the privilege of extritoriality. But as soon as circumstances allow, the prize must be conducted from the neutral port to that of the Prize Court, and only if the condition of the prize does not at all allow this, may the Prize Court give its verdict in the absence of the prize after the ship papers of the prize and witnesses have been produced before it. The whole of the crew of the prize are, as a rule, to be kept on board and to be brought before the Prize Court. But if this is impracticable, several important members of the crew, such as the master, mate, or supercargo, must be kept on board, whereas the others may be removed and forwarded to the port of the Prize Court by other means of transport. The whole of the cargo is, as a rule, also to remain on board the prize. But if the whole or part of the cargo is in a condition which prevents it from being sent to the port of the Prize Court, it can, according to the merits of the case, either be destroyed or sold in the nearest port, and in the latter case an account of the sale has to be sent to the Prize Court. All neutral goods amongst the cargo are also to be taken to the port of adjudication, although they have now, according to the Declaration of Paris, to be restored to their neutral owners. But if such neutral goods are not in a condition to be taken to the port of

adjudication, they may likewise be sold or destroyed, as the case may be.

Destruction  
of  
Prize.

§ 194. Since through adjudication by the Prize Courts the property of captured enemy private vessels becomes finally transferred to the belligerent whose forces made the capture, it is evident that then the captured vessel as well as her cargo may be destroyed. On the other hand, it is likewise evident that, since a verdict of a Prize Court is necessary for the appropriation of the prize to become final, a captured merchantman must as a rule not be destroyed instead of being conducted to the port of a Prize Court. There are, however, exceptions to the rule, but no unanimity exists in theory and practice as regards those exceptions. Whereas some<sup>1</sup> consider the destruction of a prize allowable only in case of imperative necessity, others<sup>2</sup> allow it in nearly every case of convenience. Thus, the Government of the United States of America, on the outbreak of war with England in 1812, instructed the commanders of her vessels to destroy at once all captures, the very valuable excepted, because a single cruiser, if ever so successful, could man a few prizes only, but by destroying each capture would be able to continue capturing, and thereby diminish constantly the enemy merchant fleet.<sup>3</sup> And during the Civil War in America the cruisers of the Southern Confederate States destroyed all enemy prizes because there was no port open for them to bring prizes to. According to British practice,<sup>4</sup> the captor is allowed to destroy the prize in only two cases—namely, first, when the prize

<sup>1</sup> See, for instance, Bluntschli, § 672.

<sup>2</sup> See, for instance, Martens, § 126, who moreover makes no difference between the prize being an enemy or a neutral ship.

<sup>3</sup> U.S. Naval War Code (article 14) allows the destruction "in case of military or other necessity."

<sup>4</sup> See Holland, Prize Law, §§ 303-304.

is in such a condition as prevents her from being sent to any port of adjudication ; and, secondly, when the capturing vessel is unable to spare a prize crew to navigate the prize into such a port. The *Règlement international des prises maritimes* of the Institute of International Law enumerates by its § 50 five cases in which destruction of the capture is allowed—namely (1) when the condition of the vessel and the weather make it impossible to keep the prize afloat ; (2) when the vessel navigates so slowly that she cannot follow the captor and is therefore exposed to an easy recapture by the enemy ; (3) when the approach of a superior enemy force creates the fear that the prize might be recaptured by the enemy ; (4) when the captor cannot spare a prize crew ; (5) when the port of adjudication to which the prize might be taken is too far from the spot where the capture was made. Be that as it may,<sup>1</sup> in every case of destruction of the vessel the captor must remove crew, ship papers, and, if possible, the cargo, before the destruction of the prize, and must afterwards send crew, papers, and cargo to a port of a Prize Court for the purpose of satisfying the latter that both the capture and the destruction were lawful.

But if destruction of a captured enemy merchantman can exceptionally be lawful, the question as to indemnities to be paid to the neutral owners of goods carried by the destroyed vessel requires attention. It seems to be obvious that, if the destruction of the vessel herself was lawful, and if it was not possible to remove her cargo, no indemnities need be paid. An illustrative case happened during the Franco-German War. On October 21, 1870, the French cruiser

<sup>1</sup> The whole matter is thoroughly discussed by Boeck, Nos. 268-285 ; Dupuis, Nos. 262-268, and Calvo, V. §§ 3028-3034. As regards destruction of a neutral prize, see below, § 431.



"Dessaix" seized two German merchantmen, the "Ludwig" and the "Vorwärts," but burned them because she could not spare a prize crew to navigate the prizes into a French port. The neutral owners of part of the cargo claimed indemnities, but the French Conseil d'État refused to grant indemnities on the ground that the action of the captor was lawful.<sup>1</sup>

Ransom  
of Prize.

§ 195. Although prizes have regularly to be brought before a Prize Court, International Law nevertheless does not forbid the ransoming of the captured vessel either at once after the capture or after she has been conducted to the port of a Prize Court, but before the Court has given its verdict. However, the practice of accepting and paying ransom, which grew up in the seventeenth century, is in many countries now prohibited by Municipal Law. Thus, for instance, Great Britain by section 45 of the Naval Prize Act, 1864, prohibits ransoming except in such cases as may be specially provided for by an Order of the King in Council. Where ransom is accepted, a contract of ransom is entered into by the captor and the master of the captured vessel; the latter gives a so-called ransom bill to the former, in which he promises the amount of the ransom. He is given a copy of the ransom bill for the purpose of a safe-conduct preventing his vessel from again being captured, under the condition that he keeps the course to such port as is agreed upon in the ransom bill. To secure the payment of ransom, an officer of the captured vessel can be retained as hostage, otherwise the whole of the crew is to be liberated with the vessel, ransom being an equivalent for both the restoration of the prize and the release of her crew from captivity. As long as the

<sup>1</sup> See Calvo, V. § 3033; Dupuis, No. 262; Hall, § 269.

ransom bill is not paid, the hostage can be kept in captivity. But it is exclusively a matter of Municipal Law of every State to determine whether or not the captor can sue upon the ransom bill, if the ransom is not voluntarily paid.<sup>1</sup> Should the capturing vessel, with the hostage or the ransom bill on board, be captured herself and thus become a prize of the enemy, the hostage is liberated, the ransom bill loses its effect, and it need not now be paid.<sup>2</sup>

§ 196. A prize is lost—(1) when the captor intentionally abandons her, (2) when she escapes through being rescued by her own crew, or (3) when she is recaptured. Just as through capture the prize becomes, according to International Law, the property of the belligerent whose forces made the prize, provided a Prize Court confirms the capture, so such property is lost when the prize vessel becomes abandoned, or escapes, or is recaptured. And it seems to be obvious, and everywhere recognised by Municipal Law, that as soon as a captured enemy merchantman succeeds in escaping, the proprietorship of the former owners revives *ipso facto*. But the case is different when a captured vessel, whose crew remain prisoners on board the capturing vessel, is abandoned and afterwards met and taken possession of by a neutral vessel or by a vessel of her home State. It is certainly not for International Law to determine whether or not the original proprietorship revives through abandonment. This is a matter of Municipal Law.

Loss of  
Prize,  
especially  
Recap-  
ture.

<sup>1</sup> See Hall, § 151, p. 479:—"The English Courts refuse to accept such arrangements (for ransom) from the effect of the rule that the character of an alien enemy carries with it a disability to sue, and compel payment of the debt indirectly through an action brought by the imprisoned hostage

for the recovery of his freedom." The American Courts, in contradistinction to the British, recognise ransom bills.

<sup>2</sup> The matter of ransom is treated with great lucidity by Twiss, II. §§ 180-183; Boeck, Nos. 257-267; Dupuis, Nos. 269-277.

The case of recapture is likewise different from escape. Here too Municipal Law has to determine whether or not the former proprietorship revives, since International Law lays down the rule only that recapture takes the vessel out of the property of the enemy and brings her into the property of the belligerent whose forces made the recapture. Municipal Law of the individual States has settled the matter differently. Thus, Great Britain, by section 40 of the Naval Prize Act, 1864, enacted that the recaptured vessel, except when she has been used by the captor as a ship of war, shall be restored to her former owner on his paying one-eighth to one-fourth, as the Prize Court may award, of her value as prize salvage, no matter if the recapture was made before or after the enemy Prize Court had confirmed the capture. Other States restore a recaptured vessel only when the recapture was made within twenty-four hours<sup>1</sup> after the capture occurred, or before the captured vessel was conducted into an enemy port, or before she was condemned by an enemy Prize Court.

**Fate of  
Prize.**

§ 197. Through being captured and afterwards condemned by a Prize Court, a captured enemy vessel and captured enemy goods become the property of the belligerent whose forces made the capture. What becomes of the prize after the condemnation is not for International, but for Municipal Law to determine. A belligerent can hand the prize over to the officers and crew who made the capture, or can keep her altogether for himself, or can give a share to those who made the capture. As a rule, prizes are sold after they are condemned, and the whole or a part of the net proceeds is distributed among the officers and crew who made the capture. For Great

<sup>1</sup> So, for instance, France; see Dupuis, Nos. 278-279.

Britain this distribution is regulated by the "Royal Proclamation as to Distribution of Prize Money" of August 3, 1886.<sup>1</sup> There is no doubt whatever that, if a neutral subject buys a captured ship after her condemnation, she cannot be attacked and captured by the belligerent to whose subject she formerly belonged, although, if she is bought by an enemy subject and afterwards captured, she might be restored<sup>2</sup> to her former owner.

§ 198. It has been already stated above in § 92 that merchantmen owned by subjects of neutral States but sailing under enemy flag are vested with enemy character. It is, therefore, evident that they may be captured and condemned. As at present no non-littoral State has, in fact, a maritime flag, vessels belonging to subjects of such States are forced to navigate under the flag of another State,<sup>3</sup> and they are, therefore, in case of war exposed to capture. As this is rather hard, it may, perhaps, be expected that in future belligerents will instruct their Prize Courts to release such vessels provided the owners furnish proof of the neutral ownership and the necessity for them to sail under the enemy's flag. A remarkable case occurred during the Franco-German War. In January 1871 the "Palme," a vessel belonging to the Missionary Society of Basle, was captured by a French man-of-war, and condemned by the Prize Court of Bordeaux. The owners appealed and the French Conseil d'État set the vessel free, because equity demanded the fact to be taken into consideration that Swiss subjects owning vessels were obliged to have them sailing under the flag of another State. This Court further remarked that, although

Vessels  
belonging  
to Sub-  
jects of  
Neutral  
States, but  
sailing  
under  
Enemy  
Flag.

<sup>1</sup> See Holland, Prize Law, pp. 142-150.

<sup>2</sup> See above, § 196.

<sup>3</sup> See above, vol. I. § 261.

a man-of-war would always be justified in capturing such a vessel on account of her ship papers, the owners would be authorised to furnish the proof of the neutral ownership of the vessel, and of the absence of *mala fides* in having her sailing under the enemy flag.<sup>1</sup>

Effect of  
Sale of  
Enemy  
Vessels  
during  
War.

§ 199. Since enemy vessels are liable to capture, the question must be taken into consideration whether the fact that an enemy vessel has been sold during the war to a subject of a neutral or to a subject of the belligerent State whose forces seized her, has the effect of excluding her appropriation.<sup>2</sup> It is obvious that, if the question is answered in the affirmative, the owners of enemy vessels can evade the danger of having their property captured by selling their vessels. Now there is no general rule of International Law which answers the question. The rule ought to be that, since commerce between belligerents' subjects and neutral subjects is not at all prohibited through the outbreak of war, a *bona fide* sale of enemy vessels should have the effect of freeing such vessels from appropriation, as they are, in fact, no longer enemy property. But the practice among the States varies. Thus, France<sup>3</sup> does not recognise any such sale after the outbreak of war. On the other hand, the practice of Great Britain<sup>4</sup> and the United States of America<sup>5</sup> recognises such sale, provided it was made *bona fide*, and the new owner has actually taken possession of the sold vessel. Therefore, if the sale was contracted *in*

<sup>1</sup> See Rivier, II. pp. 343-344, and Dupuis, No. 158.

<sup>2</sup> See Holland, Prize Law, § 19; Hall, § 171; Twiss, II. §§ 162-163; Phillimore, III. § 386; Boeck, Nos. 178-180; Dupuis, Nos. 117-129; Bonfils, Nos. 1344-1349.

<sup>3</sup> See Dupuis, Nos. 96-97.

<sup>4</sup> The *Sechs Geschwistern*, 4 Rob. 100; the *Jemmy*, 4 Rob. 31; the *Omnibus*, 4 Rob. 71.

<sup>5</sup> The *Benito Estenger*, 176, United States, 568.

*transitu*, the vessel having started her voyage as an enemy vessel, the sale is not recognised, when the vessel is detained on her voyage, before the new owner has actually taken possession of her.<sup>1</sup>

§ 200. If a captured enemy vessel carries goods consigned by enemy subjects to subjects of neutral States, or to subjects of the belligerent whose forces captured the vessel, they may not be appropriated, provided the consignee can prove that he is the owner. As regards such goods found on captured enemy merchantmen as are consigned to enemy subjects but have been sold *in transitu* to subjects of neutral States, there is no unanimous practice of the different States in existence.<sup>2</sup> British<sup>3</sup> and American<sup>4</sup> practice refuse to recognise such sale *in transitu* under all circumstances and conditions, if the vessel concerned is captured before the neutral buyer has actually taken possession of the goods. On the other hand, French<sup>5</sup> practice recognises such sale *in transitu* provided it can be proved that the transaction was made *bona fide*.

Goods sold  
by and to  
Enemy  
Subjects  
during  
War.

<sup>1</sup> The Vrow Margaretha, 1 Rob. 336; the Jan Frederick, 5 Rob. 128. <sup>2</sup> The Jan Frederick, 5 Rob. 128.

<sup>3</sup> See Hall, § 172; Twiss, II. §§ 162, 163; Phillimore, III. §§ 387, 388; Dupuis, Nos. 141-149; Boeck, Nos. 182, 183. <sup>4</sup> The Ann Green, 1 Gallison, 274.

<sup>5</sup> See Boeck, l.c., No 162; Dupuis, No. 142.

## IV

## VIOLENCE AGAINST ENEMY PERSONS

See the literature quoted above at the commencement of § 107. See also Bonfils, No. 1273.

Violence  
against  
Combat-  
ants.

§ 201. As regards killing and wounding combatants in sea warfare and the means used for that purpose, customary rules of International Law are in existence according to which only those combatants can be killed or wounded who are able and willing to fight or who resist capture. Men disabled by sickness or wounds, or such men as lay down arms and surrender or do not resist capture, must be given quarter, except in a case of imperative necessity or of reprisals. Poison, and such arms, projectiles, and materials as cause unnecessary injury, are prohibited, as is also killing and wounding in a treacherous way.<sup>1</sup> The Declaration of St. Petersburg<sup>2</sup> and the Hague Declaration prohibiting the use of expanding (Dum-Dum)<sup>3</sup> bullets, apply to sea warfare as well as to land warfare, as also did the now expired Hague Declarations concerning projectiles and explosives launched from balloons, and projectiles diffusing asphyxiating or deleterious gases.<sup>4</sup>

All combatants, further, all officers and members of the crews of merchantmen can be made prisoners of war.<sup>5</sup> As soon as such prisoners are landed their

<sup>1</sup> See the corresponding rules for warfare on land, which are discussed above in §§ 108-110. See also U.S. Naval War Code, article 3.

<sup>2</sup> See above, § 111.

<sup>3</sup> See above, § 112.

<sup>4</sup> See above, §§ 113 and 114.

<sup>5</sup> This is pretty generally recognised, but was refused recognition by Count Bismarck during the Franco-German War (see below, § 249) and is still denied by some German publicists, as, for instance, Lueder in Holtzendorff, IV. p. 479, note 6.

treatment falls under articles 4-20 of the Hague Regulations. As long, however, as they are on board, the old customary rule of International Law, that prisoners must be treated humanely,<sup>1</sup> and not like convicts, must be complied with. The Hague Convention for the adaptation of the Geneva Convention to sea warfare enacts, however, some rules concerning the shipwrecked, the wounded, and the sick who through falling into the hands of the enemy become prisoners of war.<sup>2</sup>

§ 202. Just as military forces consist of combatants and non-combatants, so do naval forces of belligerents. Non-combatants, as, for instance, stokers, surgeons, chaplains, members of the hospital staff, and the like, who do not take part in the fighting, may not be attacked directly and killed or wounded.<sup>3</sup> But they are exposed to all injuries indirectly resulting from attacks on and by their vessels. And they can certainly be made prisoners of war, with the exception of members of the religious, medical, and hospital staff, who are inviolable according to article 7 of the Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention.<sup>4</sup>

§ 203. Since and so far as enemy individuals who are on board an attacked or seized enemy vessel and do not belong to the naval forces do not take part in the fighting, they may not directly be attacked and killed or wounded, although they are exposed to all injury indirectly resulting from an attack on or by their vessel. If they are mere private individuals, they can only exceptionally and under the same

Violence  
against  
Non-com-  
batant  
Members  
of Naval  
Forces.

Violence  
against  
Enemy In-  
dividuals  
not  
belonging  
to the  
Naval  
Forces.

<sup>1</sup> See Holland, Prize Law, § 249, and U.S. Naval War Code, articles 10, 11.

<sup>2</sup> See U.S. Naval War Code, article 3.

<sup>3</sup> See below, § 205.

<sup>4</sup> See below, § 205.



circumstances as private individuals on occupied territory be made prisoners of war.<sup>1</sup> But they are nevertheless, for the time they are on board the captured vessel, under the discipline of the captor. All restrictive measures against them which are necessary are therefore lawful, as are also punishments, in case they do not comply with lawful orders of the commanding officer. If they are enemy officials in important positions,<sup>2</sup> they can be made prisoners of war.

## V

### TREATMENT OF WOUNDED AND SHIPWRECKED.

Perels, § 37—Pillet, pp. 188-191—Bonfils, No. 1280—U.S. Naval War Code, articles 21-29—Ferguson, "The Red Cross Alliance at Sea" (1871)—Houette, "De l'extension des principes de la Convention de Genève aux victimes des guerres maritimes" (1892)—Cauwès, "L'extension des principes de la Convention de Genève aux guerres maritimes" (1899)—Holls, "The Peace Conference at the Hague" (1900), pp. 120-132—Fauchille in R.G., VI. (1899), pp. 291-302—Bayer, in R.G., VIII. (1901), pp. 225-230. See also the literature quoted above at the commencement of § 118.

Adapta-  
tion of  
Geneva  
Conven-  
tion to Sea  
Warfare.

§ 204. Soon after the Geneva Convention the necessity of adapting its principles to naval warfare was generally recognised, and among the non-ratified additional articles to the Geneva Convention signed at the Congress convened in 1868 at Geneva were nine which undertook such an adaptation. But it was not until the Hague Peace Conference in 1899 that an adaptation came into legal existence. This adaptation is contained in the "Convention,"<sup>3</sup> for the

<sup>1</sup> See U.S. Naval War Code, article 11, and above, § 116.

<sup>2</sup> Martens, N.R.G., 2nd ser. XXVI. p. 979.

<sup>3</sup> See above, § 117.

Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864." This Convention contains fourteen articles, which not only provide rules regarding the treatment of wounded, sick, and shipwrecked sailors and marines, but, in the interest of such wounded, sick, and shipwrecked individuals, provide also rules regarding (1) hospital ships, (2) neutral ships taking or having on board belligerents' wounded, sick, or shipwrecked, (3) further, the religious, medical, and hospital staff of captured ships. The original Convention contained also, in its tenth article, the following stipulation:—"The shipwrecked, wounded, or sick, who are landed at a neutral port with the consent of the local authorities, must, failing a contrary arrangement between the neutral State and the belligerents, be guarded by the neutral State, so that they cannot again take part in the military operations. The expenses of entertainment and internment shall be borne by the State to which the shipwrecked, wounded, or sick belong." But as Great Britain, Germany, the United States, and Turkey in signing the Convention reserved special liberty of action with regard to this tenth article, all the parties agreed upon the suggestion of Russia to ratify the Convention with exclusion of article 10, by inserting in the act of ratification a copy of the Convention in which the text of article 10 is replaced by the word *Exclu.*<sup>1</sup> Thus article 10 was dropped, but the original numbering of the articles remains.

§ 205. Enemy sailors and soldiers who are taken on board when sick or wounded must be protected and tended by the captors (article 8). All enemy shipwrecked, wounded, or sick, who fall into the

The  
Wounded,  
Sick, and  
Ship-  
wrecked.

<sup>1</sup> See above, vol. I. § 517, note 4, and Holls, *loc. cit.* p. 128.

hands of a belligerent are prisoners of war. It is left to the captor to determine whether they are to be kept on board or to be sent to a port of his own country, or neutral port, or even a hostile port; and in the last case such repatriated prisoners must be prevented by their Government from again serving in the war (article 9).

**Hospital  
Ships.**

§ 206. Articles 1 to 5 deal with so-called hospital ships, of which three different kinds are distinguished—namely (1) military hospital ships, (2) hospital ships equipped by private individuals or relief societies of the belligerents, and (3) hospital ships equipped by private neutral individuals and neutral relief societies.

Military hospital ships are ships constructed or assigned by States specially and solely for the purpose of assisting the wounded, sick, and shipwrecked. Their names must be communicated to the belligerents at the commencement of or during hostilities, and in any case before they are employed. They must be respected by the belligerents, they cannot be captured while hostilities last, and they are not on the same footing as men-of-war during their stay in a neutral port.

Hospital ships equipped wholly or in part at the cost of private individuals or officially recognised relief societies of the belligerents must be respected by either belligerent, and are exempt from capture, provided their home State has given them an official commission and has notified their names to the other belligerent at the commencement of or during hostilities, and in any case before they are employed. They must, further, be furnished with a certificate from the competent authorities declaring that they had been under the latter's control while fitting out and on final departure.

Hospital ships equipped wholly or in part at the cost of private individuals or officially recognised relief societies of neutral States must likewise be respected, and are exempt from capture, provided their home State has given them an official commission and notified their names to the belligerents at the commencement of or during hostilities, and in any case before they are employed.

All military and other hospital ships must afford relief and assistance to the wounded, sick, and shipwrecked of either belligerent. The respective Governments are prohibited from using these ships for any military purpose. The commanders of these vessels must not in any way hamper the movements of the combatants, and during and after an engagement they act at their own risk and peril. Both belligerents have a right to control and visit all military and other hospital ships, to refuse their assistance, to order them off, to make them take a certain course, to put a commissioner on board, and, lastly, to detain them temporarily, if important circumstances require this. In case a hospital ship receives orders from a belligerent, these orders must, as far as possible, be inscribed in the ship papers.

For the purpose of defining the status of hospital ships when entering neutral ports an International Conference met at the Hague in 1904, where Germany, Austria-Hungary, Belgium, China, Korea, Denmark, Spain, the United States of America, France, Greece, Guatemala, Italy, Japan, Luxemburg, Mexico, Holland, Persia, Portugal, Roumania, Russia, Servia, and Siam were represented. Great Britain, however, did not take part. The following is the text of the six articles of the Convention signed by all the representatives ;—

Article 1.—Hospital ships fulfilling the conditions prescribed in articles 1, 2, and 3 of the Convention concluded at the Hague on July 27, 1899, for the adaptation of the principles of the Geneva Convention of August 22, 1864, to naval warfare shall in time of war be exempt in the ports of the contracting parties from all dues and taxes imposed on vessels for the benefit of the State.

Article 2.—The provision contained in the preceding article shall not prevent the exercise of the right of search and other formalities demanded by the fiscal and other laws in force in the said ports.

Article 3.—The regulation laid down in article 1 is binding only upon the contracting Powers in case of war between two or more of themselves. The said rule shall cease to be obligatory as soon as in a war between any of the contracting Powers a non-contracting Power shall join one of the belligerents.

Article 4.—The present Convention, which bears date of this day and may be signed up to October 1, 1905, by any Power which shall have expressed a wish to do so, shall be ratified as speedily as possible. The ratifications shall be deposited at the Hague. On the deposit of the ratifications, a *procès-verbal* shall be drawn up, of which a certified copy shall be conveyed by diplomatic channels, after the deposit of each ratification, to all the contracting Powers.

Article 5.—Non-signatory Powers will be allowed to adhere to the present convention after October 1, 1905. For that purpose they will have to make known the fact of their adhesion to the contracting Powers by means of a written notification addressed to the Government of the Netherlands, which will be communicated by that Government to all the other contracting Powers.

Article 6.—In the event of any of the high contracting parties denouncing the present Convention, the denunciation shall only take effect after notification has been made in writing to the Government of the Netherlands and communicated by that Government at once to all the other contracting Powers. Such denunciation shall be

effective only in respect of the Power which shall have given notice of it.

§ 207. All military hospital ships must be painted white outside with a horizontal band of green about one mètre and a half in breadth. Other hospital ships must also be painted white outside, but with a horizontal band of red. All boats and small craft of hospital ships used for hospital work must also be painted white. And besides being obliged to be painted in a distinguishing colour, all military and other hospital ships (article 5) must hoist, together with their national flag, the white flag with a red cross provided by the Geneva Convention. Although here too the red cross is expressly stipulated as the distinctive emblem, there is no objection to non-Christian States who object to the cross on religious grounds adopting another emblem. The committee of the Hague Peace Conference, which prepared the Convention for the adaptation of the principles of the Geneva Convention to naval warfare, took official notice of a declaration of the Persian delegate that Persia would, instead of the red cross, adopt a red sun, and of a declaration of the Siamese representative that Siam reserved the right to adopt, instead of the red cross, a symbol sacred in the Buddhistic cult. And it is certain that Turkey will here too adopt the red crescent instead of the cross.<sup>1</sup>

Distinc-  
tive  
Colour  
and Em-  
blem of  
Hospital  
Ships.

§ 208. Neutral merchantmen, yachts, and other vessels, which have or take on board sick, wounded, or shipwrecked of the belligerents, cannot be captured for so doing, although they are liable to capture for any violation of neutrality they may have committed (article 6). By this rule a belligerent is prevented from capturing the merchantmen concerned for

Neutral  
Ships  
assisting  
the  
Wounded.

<sup>1</sup> See above, § 123, and Halls, l.c., pp. 125-126.

so-called analogous of contraband—that is, carriage of persons or despatches for the enemy.<sup>1</sup> But the convention does not comprise any rule concerning the question what is to be done with the rescued men, whether wounded or sick or simply shipwrecked and therefore able to fight again after having been rescued. Must they be given up on request to the other party? If not, can they be allowed to return home? Are they bound not to take up arms again during the war? The United States proposed some additional articles to the Convention which would have settled the matter, but withdrew the proposal afterwards.<sup>2</sup> The question is therefore not settled, and belligerents can act at will in the matter.

That neutral men-of-war cannot be seized for taking shipwrecked, wounded, and sick on board is a matter of course. But as regards this case too, the question of the final disposal of the rescued is not settled, especially as the original article 10 of the Convention has been dropped before ratification.<sup>3</sup>

The  
Religious,  
Medical,  
and  
Hospital  
Staff.

§ 209. Whatever vessel is captured, her religious, medical, and hospital staff is inviolable, and its members cannot be made prisoners of war, but they must continue to discharge their duties while necessary. And if they do this, the belligerent into whose hands they have fallen has to pay them their salaries. They can leave the ship, when the commander-in-chief considers it possible, and on leaving they are allowed to take with them all surgical articles and instruments which are their private property (article 7).

<sup>1</sup> See below, § 408.

<sup>2</sup> See Holls, l.c., p. 131.

<sup>3</sup> See below, § 348, and Lawrence, War, pp. 63-75.

## VI

## ESPIONAGE, TREASON, RUSES

See the literature quoted above at the commencement of §§ 159 and 163.

§ 210. Espionage and treason do not play the same part in sea warfare as in land warfare,<sup>1</sup> still they may occur and be made use of by belligerents. But it must be specially observed that, since the Hague Regulations deal only with land warfare, the legal necessity of trying a spy by court-martial according to article 30 of these Regulations does not exist for sea warfare, although such trial by court-martial is advisable.

Espionage  
and  
Treason.

§ 211. Ruses are customarily allowed within the same limits in sea warfare as in land warfare, perfidy being excluded. As regards the use of a false flag, it is by most publicists considered perfectly lawful for a man-of-war to use a neutral's or the enemy's flag (1) when chasing an enemy vessel, (2) when trying to escape, and (3) for the purpose of drawing an enemy vessel into action.<sup>2</sup> On the other hand, it

Ruses.

<sup>1</sup> See above, §§ 159-162.

<sup>2</sup> The use of a false flag on the part of a belligerent man-of-war is analogous to the controverted use of the enemy flag and the like in land warfare; see above, § 164. British practice—see Holland, Prize Law, § 200—permits the use of false colours. U.S. Naval War Code, article 7, forbids it now altogether, whereas as late as 1898, during the war with Spain in consequence of the Cuban insurrection, two American men-of-war did make use of the Spanish flag (see Perels, p. 183). And during the war between Turkey

and Russia, in 1877, Russian men-of-war in the Black Sea made use of the Italian flag (see Martens, II. § 103, p. 566). The question of the permissibility of the use of a neutral or enemy flag is answered in the affirmative, among others, by Ortolan, II. p. 29; Flore, III. No. 1340; Perels, § 35, p. 183; Pillet, p. 116; Bonfils, No. 1274; Calvo, IV. 2106; Hall, § 187. See also Pillet in R.G., V. (1898), pp. 444-451. But see the arguments against the use of a false flag in Pradier-Fodéré, VI. No. 2760.



is universally agreed that immediately before an attack a vessel must fly her national flag. Halleck (I. p. 568) relates the following instance: In 1783 the "Sybille," a French frigate of thirty-eight guns, enticed the British man-of-war "Hussar" by displaying the British flag and intimating herself to be a distressed prize of a British captor. The "Hussar" approached to succour her, but the latter at once attacked the "Hussar" without showing the French flag. She was, however, overpowered and captured, and the commander of the "Hussar" publicly broke the sword of the commander of the "Sybille," whom he justly accused of perfidy, although the French commander was acquitted when subsequently brought to trial by the French Government. Again, Halleck (I. p. 568) relates: In 1813 two merchants of New York carried out a plan for destroying the British man-of-war "Ramillies" in the following way. A schooner with some casks of flour on deck was expressly laden with several casks of gunpowder having trains leading from a species of gunlock, which, upon the principle of clock-work, went off at a given period after it had been set. To entice the "Ramillies" to seize her, the schooner came up, and the "Ramillies" then sent a boat with thirteen men and a lieutenant to cut her off. Subsequently the crew of the schooner abandoned her and she blew up with the lieutenant and his men on board.

Vattel (III. § 178) relates the following case of perfidy: In 1755, during war between Great Britain and France, a British man-of-war appeared off Calais, made signals of distress for the purpose of soliciting French vessels to approach to her succour, and seized a sloop and some sailors who came to bring

her help. Vattel is not certain himself whether this case is a fact or fiction. But be that as it may, there is no doubt that, if the case be true, it is an example of perfidy which is not allowed.

## VII

### REQUISITIONS, CONTRIBUTIONS, BOMBARDMENT

Hall, § 140\*—Lawrence, § 229—Taylor, § 499—Bonfils, No. 1277—Despagnet, No. 616—Pillet, p. 117—Perels, § 35, p. 181—Holland, *Studies*, pp. 96–111—Dupuis, Nos. 67–73.

§ 212. No case has to my knowledge hitherto occurred in Europe<sup>1</sup> of requisitions or contributions imposed by naval forces upon enemy coast towns. The question whether or not such requisitions and contributions would be lawful became of interest through an article on naval warfare of the future, published in 1882 by the French Admiral Aube in the "*Revue des Deux Mondes*" (vol. 50, p. 331). Aube pointed out that one of the tasks of the fleet in sea warfare of the future would be to attack and destroy by bombardment fortified and unfortified military and commercial enemy coast towns, or at least to compel them mercilessly to requisitions and contributions. As during the British naval manœuvres of 1888 and 1889 imaginary contributions were imposed upon several coast towns, Hall, § 140\*, takes the question into consideration under what conditions requisitions and contributions would be lawful in sea warfare. Hall concludes, after careful consideration,

Requisi-  
tions and  
Contribu-  
tions upon  
Coast  
Towns.

<sup>1</sup> Holland, *Studies*, p. 101, mentions a case which occurred in South America in 1871.

that such requisitions and contributions may be levied, provided a force is landed which actually takes possession of the respective coast town and establishes itself there, although only temporarily, until the imposed requisitions and contributions have been complied with ; that, however, no requisitions or contributions could be demanded by a single message sent on shore under threatened penalty of bombardment in case of refusal. There is no doubt that Hall's arguments are logically correct. But whether the practice of sea warfare in future will be in accordance with the rules laid down by Hall is at least doubtful. Hall starts from the principles regarding requisitions and contributions in land warfare, yet it is not at all certain that the naval Powers would consider themselves bound by these principles as regards maritime operations. Be that as it may, the fact is certain that articles 51 and 52 of the Hague Regulations apply to land warfare only.<sup>1</sup>

Bombard-  
ment of  
the  
Enemy  
Coast.

§ 213. There is no doubt whatever that enemy coast towns which are defended can be bombarded by naval forces, either acting independently or in co-operation with a besieging army. But the question is whether or not open and undefended coast places can be bombarded by naval forces. The Institute of International Law appointed in 1895 at its meeting at Cambridge a committee to investigate the matter. The report<sup>2</sup> of this committee, drafted by Professor Holland with the approval of the Dutch General Den Beer Portugael, and presented in 1896

<sup>1</sup> The Institute of International Law has touched upon the question of requisitions and contributions in sea warfare in article 4, No. 1, of its rules regarding the bombardment of open towns by naval forces ; see

below, p. 222. U.S. Naval War Code, article 4, allows "reasonable" requisitions, but no contributions, since "ransom" is not allowed.

<sup>2</sup> See *Annuaire*, XV. (1896), pp. 148-150.

at the meeting at Venice,<sup>1</sup> is of such interest that I think it advisable to reproduce here in translation the following chief parts of it:—

When the Prince de Joinville recommended in 1844, in case of war, the devastation of the great commercial towns of England, the Duke of Wellington wrote:—"What but the inordinate desire of popularity could have induced a man in his station to write and publish such a production, an invitation and provocation to war, to be carried on in a manner such as has been disclaimed by the civilized portions of mankind?" (Raikes, "Correspondence," p. 367). The opinion of the Prince de Joinville has been taken up by Admiral Aube in an article which appeared in the "*Revue des Deux Mondes*" in 1882. After having remarked that the ultimate object of war is to inflict the greatest possible damage to the enemy and that "*La richesse est le nerf de la guerre*," he goes on as follows:—"Tout ce qui frappe l'ennemi dans sa richesse devient non seulement légitime, mais s'impose comme obligatoire. Il faut donc s'attendre à voir les flottes cuirassées, maitresses de la mer, tourner leur puissance d'attaque et destruction, à défaut d'adversaires se dérobant à leurs coups, contre toutes les villes du littoral, fortifiées ou non, pacifiques ou guerrières, les incendier, les ruiner, et tout au moins les rançonner sans merci. Cela s'est fait autrefois; cela ne se fait plus; cela se fera encore: Strasbourg et Péronne en sont garants. . . ."

The discussion was opened again in 1888, on the occasion of manœuvres executed by the British Fleet, the enemy part of which feigned to hold to ransom, under the threat of bombardment, great commercial towns, such as Liverpool, and to cause unnecessary devastation to pleasure towns and bathing-places, such as Folkestone, through throwing bombs. One of your reporters observed in a series of letters addressed to the "*Times*" that such acts are contrary to the rules of International Law as well as to the practice of the present century. He maintained that bombardment of an open town ought to be allowed only for

<sup>1</sup> See *Annuaire*, XV. (1896), p. 313.

the purpose of obtaining requisitions in kind necessary for the enemy fleet and contributions instead of requisitions, further by the way of reprisals, and in case the town defends itself against occupation by enemy troops approaching on land. . . . Most of the admirals and naval officers of England who took part in the lively correspondence which arose in the "Times" and other journals during the months of August and September 1880 took up a contrary attitude. . . .

On the basis of this report the Institute, at the same meeting, adopted a body of rules regarding the bombardment of open towns by naval forces, declaring that the rules of the law of war concerning bombardment are the same regarding land warfare and sea warfare. Of special interest are articles 4 and 5 of these rules, which run as follows :—

Article 4. In virtue of the general principles above, the bombardment by a naval force of an open town, that is to say one which is not defended by fortifications or by other means of attack or of resistance for immediate defence, or by detached forts situated in proximity, for example of the maximum distance of from four to ten kilometres, is inadmissible except in the following cases :—

(1) For the purpose of obtaining by requisitions or contributions what is necessary for the fleet. These requisitions or contributions must in every case remain within the limits prescribed by articles 56 and 58 of the Manual of the Institute.

(2) For the purpose of destroying sheds, military erections, depots of war munitions, or of war vessels in a port. Further, an open town which defends itself against the entrance of troops or of disembarked marines can be bombarded for the purpose of protecting the disembarkation of the soldiers and of the marines, if the open town attempts to prevent it, and as an auxiliary measure of war to facilitate the result made by the troops and the disembarked marines, if the town defends itself. Bombardments

of which the object is only to exact a ransom, are specially forbidden, and, with the stronger reason, those which are intended only to bring about the submission of the country by the destruction, for which there is no other motive, of the peaceful inhabitants or of their property.

Article 5. An open town cannot be exposed to a bombardment for the only reasons :—

(1) That it is the capital of the State or the seat of the Government (but naturally these circumstances do not guarantee it in any way against a bombardment).

(2) That it is actually occupied by troops, or that it is ordinarily the garrison of troops of different arms intended to join the army in time of war.

Thus the matter stands as far as the Institute of International Law is concerned. But nobody can say what line of action naval forces will follow in the future regarding bombardment of the enemy coast.<sup>1</sup>

The U.S. Naval War Code now deals with the question in its article 4. The bombardment of undefended unfortified towns is thereby forbidden, except (1) when such bombardment is incidental to the destruction of military and naval establishments and the like, (2) when the reasonable requisitions are not complied with. The bombardment for the non-payment of "ransom" is absolutely forbidden.

<sup>1</sup> Amongst the six "wishes" expressed by the final act of the Hague Peace Conference is the following :—"The Conference expresses the wish that the proposal to settle

the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent Conference for consideration."

## VIII

## INTERFERENCE WITH SUBMARINE TELEGRAPH CABLES

*Liszt*, § 41, VI.—*Bonfils*, No. 1278—*Pradier-Fodéré*, VI. No. 2772—*Fiore*, III. No. 1387—*Perels*, § 35, p. 185—*Perdrix*, "Les câbles sousmarines et leur protection internationale" (1902)—*Kraemer*, "Die unterseeischen Telegraphenkabel in Kriegzeiten" (1903)—*Scholz*, "Krieg und Seekabel" (1904)—*Holland*, in "Journal de Droit International Privé et de la Jurisprudence comparée" (Clunet), XXV. (1898), pp. 648-652—*Goffin*, in "The Law Quarterly Review," XV. (1899), pp. 145-154—*Bar*, in the "Archiv für Öffentliches Recht," XV. (1900), pp. 414-421—*Rey*, in R.G., VIII. (1901), pp. 681-762—*Dupuis*, in R.G., X. (1903), pp. 532-547. See also the literature quoted above, vol. I., at the commencement of § 286.

Uncertainty of Rules concerning Interference with Submarine Telegraph Cables.

§ 214. As the "International Convention<sup>1</sup> for the Protection of Submarine Telegraph Cables" of 1884 stipulates expressly by its article 15 that freedom of action is reserved to belligerents, the question is not settled how far belligerents are entitled to interfere with submarine telegraph cables. The Institute of International Law has studied the matter and adopted,<sup>2</sup> at its meeting at Brussels in 1902, the following five rules:—

(1) Le câble sousmarin reliant deux territoires neutres est inviolable.

(2) Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre.

(3) Le câble reliant un territoire neutre au territoire d'un des belligérants ne peut en aucun cas être coupé dans la mer territoriale ou dans les eaux neutralisées dépendant d'un territoire neutre. En haute mer, ce câble ne peut être coupé que s'il y a blocus effectif et dans les limites de la ligne du blocus, sauf rétablissement du câble dans le plus

<sup>1</sup> See above, vol. I. §§ 286 and 287.

<sup>2</sup> See *Annuaire*, XIX. (1902), p. 331.

bref délai possible. Le câble peut toujours être coupé sur le territoire et dans la mer territoriale dépendant d'un territoire ennemi jusqu'à d'une distance de trois milles marins de la laisse de basse-marée.

(4) Il est entendu que la liberté de l'État neutre de transmettre des dépêches n'implique pas la faculté d'en user ou d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants.

(5) En ce qui concerne l'application des règles précédentes, il n'y a de différence à établir ni entre les câbles d'État et les câbles appartenant à des particuliers, ni entre les câbles de propriété ennemie et ceux qui sont de propriété neutre.

The U.S. Naval War Code, article 5, lays down the following rules :—

(1) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(2) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

(3) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.<sup>1</sup>

<sup>1</sup> It is impossible for a treatise to discuss the details of the absolutely unsettled question how far belligerents can interfere with submarine telegraph cables. Readers who take a particular interest

in it may be referred to the excellent monograph of Scholz, *Krieg und Seekabel* (1904), which discusses the matter thoroughly and ably.



## CHAPTER V

### NON-HOSTILE RELATIONS OF BELLIGERENTS

#### I

#### ON NON-HOSTILE RELATIONS IN GENERAL BETWEEN BELLIGERENTS

Grotius, III. c. 19—Pufendorf, VIII. c. 7, §§ 1-2—Bynkershoek, Quæst. jur. publ. I. c. 1—Vattel, III. §§ 174-175—Hall, § 189—Lawrence, § 231—Phillimore, III. § 97—Halleck, I. pp. 310-311—Taylor, § 508—Wheaton, § 399—Bluntschli, § 679—Heffter, § 141—Lueder in Holtzendorff, IV. pp. 525-527—Ullmann, § 157—Bonfils, Nos. 1237-1238—Despagnet, No. 555—Pradier-Fodéré, VII. Nos. 2882-2887—Rivier, II. p. 367—Calvo, IV. §§ 2411-2412—Fiore, III. No. 1482—Martens, II. § 127—Longuet, §§ 134-135—Mé-  
rignhac, pp. 218-220—Pillet, pp. 355-356—Kriegsgebrauch, p. 38.

*Fides  
etiam  
hosti  
servanda.*

§ 215. Although the outbreak of war between States brings regularly all non-hostile intercourse to an end, necessity of circumstances, convenience, humanity, and other factors may call some kinds of non-hostile relations of belligerents into existence. And it is a universally recognised principle of International Law that, where such relations rise, belligerents must carry them out with due faith. *Fides etiam hosti servanda* is a rule which already in antiquity was adhered to when no International Law in the modern sense of the term existed. But it had then a religious and moral sanction only. Since in modern times war is not a condition of anarchy and lawlessness between belligerents, but a contention for many parts regulated, restricted, and modified by

law, it is obvious that, where non-hostile relations between belligerents occur, they are protected by law. *Fides etiam hosti servanda* is, therefore, a principle which nowadays enjoys a legal besides its religious and moral sanction.

§ 216. As through the outbreak of war all diplomatic intercourse and all other non-hostile relations come to an end, it is obvious that any non-hostile relations between belligerents must originate from special agreements. These agreements—so-called *commercias belli*—may either be concluded in time of peace for the purpose of creating certain non-hostile relations between the parties in case war breaks out, or they may be concluded during the very time of war. Now such non-hostile relations are created through passports, safe-conducts, safeguards, flags of truce, cartels, capitulations, and armistices. Non-hostile relations may also be created by peace negotiations.<sup>1</sup>

Different  
kinds of  
Non-  
hostile  
Relations.

§ 217. Several writers<sup>2</sup> speak of non-hostile relations between belligerents created by licences to trade granted by a belligerent to enemy subjects either within certain limits or generally. It has been explained above, in § 101, that it is for Municipal Law to determine whether or not through the outbreak of war all trade and the like is prohibited between the subjects of belligerents. Now, if the Municipal Law of one or both belligerents does contain such a prohibition, it is of course within the discretion of one or both of them to grant exceptional licences to trade to their own or the other belligerent's subjects, and such licences naturally include certain

Licences  
to trade.

<sup>1</sup> See below, § 267.

<sup>2</sup> See, for instance, Hall, § 196; Halleck, II. pp. 343-363; Lawrence, § 235; Manning, p. 168;

Taylor, § 512; Wheaton, §§ 409-410; Fiore, III. No. 1500; Pradier-Fodéré, VII. No. 2938.

privileges. Thus, for instance, if a belligerent allows enemy subjects to trade with his own subjects, enemy merchantmen engaged in such trade are exempt from capture and appropriation by the grantor. Yet it is not International Law which creates this exemption, but the very licence to trade granted by the belligerent and revocable at any moment; and no non-hostile international relations between the belligerents themselves originate from such licences. The matter would be different if belligerents agreed either in time of peace for the time of war or during time of war upon certain trade to be allowed between their subjects. However, non-hostile relations originating from such an agreement would not be relations arising out of a licence to trade, but out of a cartel.<sup>1</sup>

## II

### PASSPORTS, SAFE-CONDUCTS, SAFEGUARDS

Grotius, III. c. 21, §§ 14-22—Vattel, III. §§ 265-277—Hall, §§ 191 and 195—Lawrence, § 234—Phillimore, III. §§ 98-102—Halleck, II. pp. 323-328—Taylor, § 511—Wheaton, § 408—Bluntschli, §§ 675-678—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 525-527—Ullmann, § 157—Bonfile, Nos. 1246-1247—Despagnet, Nos. 558 and 560—Pradier-Fodéré, VII. Nos. 2884, 2932-2938—Calvo, IV. §§ 2413-2418—Fiore, III. No. 1499—Longuet, §§ 142-143—Mérignhac, pp. 239-240—Pillet, pp. 359-360—Kriegsgebranch, p. 41—Holland, War, No. 96.

Passports  
and Safe-  
conducts.

§ 218. Belligerents on occasions arrange among themselves that passports and safe-conducts shall be given to certain of each other's subjects. Passports are written permissions given by a belligerent to enemy subjects for the purpose of travelling

<sup>1</sup> See below, § 224.

within that belligerent's territory or enemy territory occupied by him. Safe-conducts are written permissions given by a belligerent to enemy subjects for the purpose of going to a particular place for a defined object, for instance, to a besieged town for conducting certain negotiations ; but safe-conducts may also be given to goods, and they comprise then the permission for such goods to be carried unmolested to a certain place. Passports as well as safe-conducts make the grantee inviolable as long and in so far as he complies with the conditions specially imposed upon him or actually corresponding with the merits of the special case. Both passports and safe-conducts are not transferable, and may be granted to enemy subjects for a limited and an unlimited period, and in the former case their validity expires with the expiration of the period. Both may be withdrawn, not only when the grantee abuses the protection, but also for military expediency. It must, however, be specially observed that passports and safe-conducts are only a matter of International Law when their grant has been arranged between the belligerents or their responsible commanders. If they are granted without such an arrangement unilaterally on the part of one of the belligerents, they fall outside the scope of International Law.<sup>1</sup>

§ 219. Belligerents on occasions arrange among themselves that they shall grant protection to certain of each other's subjects or property against their own forces in the form of safeguards, of which there are two kinds. One consists in a written order given to an enemy subject or left with enemy property and

Safe-  
guards.

<sup>1</sup> The distinction between passports and the like arranged to be granted between the belligerents, on the one hand, and, on the other, such as are granted unilaterally, would seem to be necessary, although it is generally not made.

addressed to the commander of armed forces of the grantor, in which the former is charged with the protection of the respective individual or property, and by which both become inviolable. The other kind of safeguard is given by detailing one or more soldiers to accompany enemy subjects or to guard the spot where certain enemy property is, for the purpose of protection. Soldiers on this duty are inviolable on the part of the other belligerent; they must neither be attacked nor made prisoners, and they must, on falling into the hands of the enemy, be fed, well kept, and eventually safely sent back to their corps. Just like concerning passports and safe-conduct, it must be specially observed that safeguards are only then a matter of International Law when their granting has been arranged by the belligerents, and not otherwise.

### III

#### FLAGS OF TRUCE

Hall, § 190—Lawrence, § 232—Phillimore, III. § 115—Halleck, II. pp. 333, 334—Taylor, § 510—Bluntschli, §§ 681–684—Heffter, § 126—Lueder in Holtzendorff, IV. pp. 421–423—Ullmann, § 152—Benfls, Nos. 1239–1245—Despagnet, No. 556—Pradier-Fodéré, VII. Nos. 2927–2931—Rivier, II. pp. 279–280—Calvo, IV. §§ 2430–2432—Fiore, III. No. 1378—Martens, II. § 127—Longuet, §§ 136–138—Mérignhac, pp. 220–225—Pillet, pp. 356–358—Kriegsgebrauch, pp. 26–29—Holland, War, Nos. 82–85.

Meaning  
of Flags  
of Truce.

§ 220. Although the outbreak of war brings all negotiations between belligerents to an end, and although no negotiations are regularly conducted during war, certain circumstances and conditions make it necessary or convenient for the armed forces of belligerents to enter into negotiations with each

other for some purpose or another. Since time immemorial a white flag has been used as a symbol by an armed force who wish to negotiate with the enemy, and always and everywhere it has been considered a duty of the enemy to respect this symbol. In land warfare the flag of truce is made use of in this way,<sup>1</sup> that an individual, charged by his force with the task of negotiating with the enemy, approaches the latter either carrying the flag himself or accompanied by a flag-bearer, and often also accompanied by a drummer or a bugler, or a trumpeter, and an interpreter. In sea warfare the individual charged with the task of negotiating approaches the enemy in a boat flying the white flag. The Hague Regulations have now by their articles 32 to 34 enacted most of the customary rules of International Law regarding flags of truce without adding any new rule. These rules are the same for land warfare as for naval warfare, although their validity for land warfare is now grounded on the Hague Regulations, whereas their validity for naval warfare is still based on custom only.

§ 221. As a commander of an armed force is, according to article 33 of the Hague Regulations, not obliged to receive a bearer of a flag of truce, a flag-bearer who makes his appearance may at once be signalled to withdraw. Yet he is inviolable even then from the time he displays the flag to the end of the time necessary for withdrawal. He may during this time neither be intentionally attacked nor made prisoner. However, an armed force in battle is not obliged to stop its military operations on account of the approach of an enemy flag-bearer who has been signalled to withdraw. Although the latter may not

Treat-  
ment of  
Unadmit-  
ted Flag-  
bearers.

<sup>1</sup> See Hague Regulations, article 32.

intentionally be fired upon, he may during the battle accidentally be killed or wounded without responsibility or moral blame to the belligerent concerned. And it must be specially mentioned that the commander of an armed force may inform the enemy that he will under no circumstances and conditions receive a flag-bearer either within a certain or an indefinite period. Should, in spite of such notice, a flag-bearer approach, he does not enjoy any privilege, and may be attacked and made prisoner like any other member of the enemy forces.

Treat-  
ment of  
Admitted  
Flag-  
bearers.

§ 222. Bearers of flags of truce and their party, when admitted by the other side, must be granted the privilege of inviolability. They may neither be attacked nor taken prisoners, and they must be allowed to return in due time and safely within their lines. On the other hand, the forces admitting enemy flag-bearers need not allow them to acquire information about the receiving forces and to carry it back to their own corps. Flag-bearers and their parties may, therefore, be blindfolded by the receiving forces, or be conducted by roundabout ways, or be prevented from entering into communication with other individuals than those who confer officially with them, and they may even temporarily be prevented from returning till a certain military operation is carried out, of which they have obtained information. Article 33 of the Hague Regulations enacts specifically that a commander to whom a flag of truce is sent "can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information." Bearers of flags of truce are, however, not prevented from reporting to their corps any information they have gained by observation in passing the enemy lines and in communicating with enemy individuals. But they

are not allowed to sketch maps of defences and positions, to gather information secretly and surreptitiously, to provoke or to commit treacherous acts, and the like. If they nevertheless do this, they may be court-martialled. Articles 33 and 34 of the Hague Regulations enact specifically that a flag-bearer may temporarily be detained in case he abuses his mission for the purpose of obtaining information, and that he loses all privileges of inviolability "if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery." Bearers of white flags and their party, who approach the enemy and are received, must carry<sup>1</sup> some authorisation with them, which shows that they are charged with the task of entering into negotiations (article 32), otherwise they can be retained as prisoners, since it is his mission and not the white flag itself which protects the flag-bearer. This mission protects everyone who is charged with it, notwithstanding his position in his corps and his status as a civilian or a soldier, but it does not protect a deserter. The latter may be retained, court-martialled, and punished, notice being given to his principal of the reason of punishment.<sup>2</sup>

§ 223. The abuse of his mission by an authorised flag-bearer must be distinguished from an abuse of the flag of truce itself. Such abuse is possible in two different forms :—

Abuse of  
Flag of  
Truce.

(1) The force which sends an authorised flag-bearer to the enemy has to take up a corresponding attitude; the ranks which the flag-bearer leaves being obliged to halt and to cease fire. Now it con-

<sup>1</sup> Article 32 of the Hague Regulations confirms this customary rule by speaking of an individual who is "authorised" by one of

the belligerents to enter into communication with the other.

<sup>2</sup> See Hall, § 190.



stitutes an abuse of the flag of truce if such attitude corresponding with the sending of a flag of truce is intentionally not taken up by the sending force. The case is even worse when a flag-bearer is intentionally sent with a feigned mission for the purpose of carrying out military operations on the part of the sender under the protection due on the part of the enemy to the flag-bearer and his party.

(2) The second form of a possible abuse appears in the case in which a white flag is made use of for the purpose of making the enemy believe that a flag of truce is about to be sent, although it is not sent, and of carrying out operations under the protection granted by the enemy to this pretended flag of truce.

It need hardly be specially mentioned that both forms of abuse are gross perfidy and may be met with reprisals, or with punishment of the offenders in case they fall into the hands of the enemy. The following case of abuse is related by Sir Sherston Baker in Halleck (II. p. 315):—"On July 12, 1882, while the British fleet was lying off Alexandria, in support of the authority of the Khedive of Egypt, and the rebels under Arabi Pasha were being driven to great straits, a rebel boat, carrying a white flag of truce, was observed approaching H.M.S. 'Invincible' from the harbour, whereupon H.M. ships 'Temeraire' and 'Inflexible,' which had just commenced firing, were ordered to suspend fire. So soon as the firing ceased, the boat, instead of going to the 'Invincible,' returned to the harbour. A flag of truce was simultaneously hoisted by the rebels on the Ras-el-Tin fort. These deceits gave the rebels time to leave the works and to retire through the town, abandoning the forts, and withdrawing the whole of their garrison under the flag of truce."

## IV

## CARTELS

Grotius, III. c. 21, §§ 23-30—Vattel, III. §§ 278-286—Hall, § 193—Lawrence, §§ 205 and 233—Phillimore, III. §§ 111-112—Halleck, II. pp. 326-329—Taylor, § 599—Bluntschli, §§ 679-680—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 525-527—Ullmann, § 157—Bonfil, Nos. 827 and 1280—Despagnet, Nos. 655—Pradier-Fodéré, VII. Nos. 2832-2837, 2888—Rivier, II. p. 360—Calvo, IV. §§ 2419-2429—Longuet, §§ 140, 141—Pillet, p. 359—Kriegsgebrauch, p. 38—Holland, War, No. 95—Holland, Prize Law, §§ 32-35.

§ 224. Cartels are conventions between belligerents concluded for the purpose of permitting certain kinds of non-hostile intercourse between one another such as would otherwise be prevented through the condition of war. Cartels may be concluded during peace in case of war, or during the time of war, and they may provide for numerous purposes. Thus, communication by post, telegraph, telephone, and railway, which would otherwise not take place, may be arranged by cartels, or the exchange of prisoners, or a certain treatment of wounded, and the like. Thus, further, intercourse between each other's subjects through trade<sup>1</sup> may, either within certain limits or unlimitedly, be agreed upon by belligerents. All rights and duties originating from cartels must be complied with in the same manner and good faith as rights and duties arising from other treaties.

Definition  
and Pur-  
pose of  
Cartels.

§ 225. Cartel ships<sup>2</sup> are vessels of belligerents which are commissioned for the carriage by sea of exchanged prisoners from the enemy country to their

Cartel  
Ships.

<sup>1</sup> See above, § 217. But arrangement for granting passports, safe-conducts, and safeguards— see above, §§ 218 and 219—is not a matter of cartels.

<sup>2</sup> See above, § 190.

own country. Custom has sanctioned the following rules regarding these cartel ships for the purpose of securing their protection on the one hand, and, on the other, their exclusive employment as a means for the exchange of prisoners: Cartel ships must not do any trade or carry any cargo or despatches;<sup>1</sup> they are especially not allowed to carry ammunition or instruments of war, except one gun for firing signals. They have to be furnished with a document from an official belonging to the home State of the prisoners and stationed in the country of the enemy declaring that they are commissioned as cartel ships. They are under the protection of both belligerents and may neither be seized nor appropriated. They enjoy this protection not only when actually carrying exchanged prisoners, but also on their way home after such carriage and on their way to fetch prisoners.<sup>2</sup> They lose the protection at once, and may consequently be seized and eventually be appropriated, in case they do not comply, either with the general rules regarding cartel ships, or with the special conditions imposed upon them.

<sup>1</sup> *The Rosina*, 2 Rob. 372; the *Venus*, 4 Rob. 355.

<sup>2</sup> *The Daifje*, 3 Rob. 139; the *La Gloire*, 5 Rob. 192.

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## V

## CAPITULATIONS

Grotius, III. c. 22, § 9—Vattel, III. §§ 261-264—Hall, § 194—Lawrence, § 236—Phillimore, III. §§ 122-127—Halleck, II. pp. 319-322—Taylor, §§ 514-516—Wheaton, § 405—Bluntschli, §§ 697-699—Heffter, § 142—Lueder in Holtzendorff, IV. p. 527—Ullmann, § 157—Bonfil, Nos. 1259-1267—Despagnet, No. 561—Pradier-Fodéré, VII. Nos. 2917-2926—Rivier, II. pp. 361-362—Calvo, IV. §§ 2450-2452—Fiore, III. Nos. 1495-1497—Martens, II. § 127—Longuet, §§ 151-154—Méringhae, pp. 225-230—Pillet, pp. 361-364—Kriegsgebrauch, pp. 38-41—Holland, War, No. 86.

§ 226. Capitulations are conventions between armed forces of belligerents regarding the surrender of fortresses and other defended places, or of men-of-war, or of a body of troops. Capitulations are military conventions only and exclusively; they must, therefore, not contain arrangements of another than a local military character concerning the surrendering forces, places, or ships. If they nevertheless contain such arrangements, the latter are not valid, except under the condition that they are ratified by the political authorities of both belligerents.<sup>1</sup> The surrender of a certain place or force may, of course, be arranged by some convention containing other than military stipulations, but such surrender would then not originate from a capitulation. And just as is their character, so the purpose of capitulations is merely military—namely, the abandonment of a hopeless struggle and resistance only involving

Character  
and  
Purpose of  
Capitula-  
tions.

<sup>1</sup> See Phillimore, III. § 123, who discusses the promise of Lord William Bentinck to Genoa, in 1814, regarding its independence, which was disowned by the British Government. Phillimore himself disapproves of the attitude of Great Britain, and so do some

foreign publicists, as, for instance, Despagnet (§ 561); but the rule that capitulations are military conventions, and that, therefore, such stipulations are not valid as are not of a local military character, is indubitable.

useless loss of life on the part of a hopelessly beset force. Therefore, whatever may be the indirect consequences of a certain capitulation, its direct consequences have nothing to do with the war at large, but are local only and concern the surrendering force exclusively.

Contents  
of Capitulations.

§ 227. If special conditions are not agreed upon in a capitulation, it is concluded under the obvious condition that the surrendering force become prisoners of war and that all war material and other public property in their possession or within the surrendering place or ship are surrendered in the condition they were at the time when the signature was given to the capitulation. Nothing prevents a force fearing surrender from destroying their provisions, munitions, their arms and other instruments of war which, when falling into the hands of the enemy, would be useful to him. Again, nothing prevents a commander, even after negotiations regarding surrender have begun, from destroying such articles. But when once a capitulation has been signed,<sup>1</sup> such destruction is no longer lawful, and, if nevertheless carried out, constitutes a perfidy which may be punished as a war crime by the other party.

But special conditions may be agreed upon between the forces concerned and must then be faithfully adhered to by both parties. The only rule which article 35 of the Hague Regulations enacts regarding capitulations is that the latter must be in accordance

<sup>1</sup> When, during the Russo-Japanese War, in January 1905, General Stoessel, the Commander of Port Arthur, had, during negotiations for surrender, but before the capitulation was signed, fortifications blown up and vessels sunk, the Press undeservedly accused him of perfidy. U.S. Naval War Code,

article 52, enacts the right principle, that "*after agreeing upon or signing a capitulation, the capitulator must neither injure nor destroy the vessels, property, or stores in his possession that he is to deliver up, unless the right to do so is expressly reserved to him in the agreement or capitulation.*"

with the demands of military honour, and, when once settled, scrupulously observed. It is instructive to give some instances of possible conditions:—A condition of a capitulation may be the provision that the convention shall be valid only, if within a certain period relief troops are not approaching. Provision may, further, be made that the surrendering forces shall not in every detail be treated like ordinary prisoners of war. Thus it may be stipulated that the officers or even the soldiers shall be released on parole, that officers remaining prisoners shall retain their swords. Whether or not a belligerent will grant or even offer such special favourable conditions depends upon the importance of the force, place, or ship to be surrendered, and upon the bravery of the surrendering force. There are even instances of capitulations which stipulated that the surrendering forces should leave the place with full honours, carrying their arms and baggage away and joining their own army unmolested by the enemy through whose lines they have to march.<sup>1</sup>

§ 228. No rule of International Law exists regarding the form of capitulations, which may, therefore, be concluded either orally or in writing. But they are usually concluded in writing. Negotiations for surrender, from whichever side they emanate, are usually sent under a flag of truce, but a force which is ready to surrender without special conditions can indicate their intention by hoisting a white flag as a signal that they abandon all and every resistance. The question whether the enemy must at once cease firing and accept the surrender, is to be answered

Form of  
Capitula-  
tions.

<sup>1</sup> During the Franco-German War the Germans granted these French forces that surrendered Belfort on February 15, 1871. most favourable conditions to the

in the affirmative, provided he is certain that the white flag was hoisted by order or with the authority of the commander of the respective force. As, however, such hoisting may well have taken place without the authority of the commander and may, therefore, be disowned by the latter, no duty exists for the enemy to cease his attack as long as he is not convinced that the white flag really indicates the intention of the commander to surrender.

Compe-  
tence to  
conclude  
Capitula-  
tions.

§ 229. The competence to conclude capitulations is vested in the commanders of the forces opposing each other. Capitulations entered into by unauthorised subordinate officers may, therefore, be disowned by the commander concerned without breach of faith. As regards special conditions of capitulations, it must be specially observed that the competence of a commander to grant them is limited<sup>1</sup> to those the fulfilment of which depends entirely upon the forces under his command. If he grants conditions against his instructions, his superiors may disown such conditions. And the same is valid if he grants conditions the fulfilment of which depends upon other forces than his own and upon superior officers. The capitulation in El Arish<sup>2</sup> on January 24, 1800, between the French General Kléber and the Turkish Grand Vizier, and approved by the British Admiral, Sir Sidney Smith, presents an illustrative example of this rule. As General Kléber, who was commanding the French army in Egypt, thought that he could not remain in Egypt, he proposed surrender under the condition that his army should be safely transported to France, carrying away their arms and baggage. The Grand Vizier accepted these conditions. The British Admiral, Sir Sidney Smith, who approved of these

<sup>1</sup> See U.S. Naval War Code, article 51. <sup>2</sup> Martens, R., VII. p. 1.

conditions, was the local commander on the coast of Egypt, but was an inferior officer to Lord Keith, the commander of the British Mediterranean fleet. The latter had, on January 8, 1800, received secret orders, dated December 15, 1799, from the British Government not to agree upon any capitulation stipulating the free return of Kléber's army to France. Sir Sidney Smith did, however, not receive instructions based on these orders before February 22, 1800, and, therefore, when he approved of the capitulation of El Arish in January, was not aware that he acted against orders of the British Government.<sup>1</sup> Lord Keith, after having received the above orders on January 8, 1800, wrote at once to General Kléber, pointing out that he was not allowed to grant the return of the French army to France.<sup>2</sup> On the other hand, the British Government, after having been informed that Sir Sidney Smith had approved of the return of the French army, sent on March 28, 1800, fresh orders<sup>3</sup> to Lord Keith, received by him at the end of April, advising him, although Sir Sidney Smith had exceeded his competence, to allow the capitulation to be carried out and the French army to be safely transported to France. Meanwhile, however, events had taken another turn. When General Kléber had on March 17, 1800, received Lord Keith's letter of January 8, he addressed a proclamation,<sup>4</sup> in which Lord Keith's letter was embodied, to his troops, asked them to prepare themselves for battle, and actually began hostilities again on March 20. He was assassinated on June 14, and General Menou took over the command, and it was the latter who received, on June 20, 1800, informa-

<sup>1</sup> Martens, R., VII. pp. 8 and 9.

<sup>2</sup> Martens, R., VII. p. 11.

<sup>3</sup> Martens, R., VII. p. 10.

<sup>4</sup> Martens, R., VII. p. 15.



tion of the changed attitude of the British Government regarding the capitulation of El Arish. Hostilities having been renewed as far back as March, General Menou refused<sup>1</sup> on his part to consent to the carrying out of the capitulation, and continued hostilities.

It is obvious that Sir Sidney Smith, in approving the capitulation, granted a condition which did not depend entirely upon himself and the forces under himself, but depended upon Lord Keith and his fleet. Lord Keith as well as the British Government could have lawfully disowned this condition. That the British Government did not do so, but was ready to ratify Sir Sidney Smith's approval, was due to the fact that it did not want to disavow Sir Sidney Smith's promises, who was not at the time aware of the orders of his Government to Lord Keith. On the other hand, the French Generals were not wrong in resuming hostilities after having received Lord Keith's first information, as thereby the capitulation fell to the ground.

Violation  
of Capitulations.

§ 230. That capitulations must be scrupulously adhered to is an old customary rule, now enacted by article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency when ordered by the belligerent Government concerned, and a war-crime when committed without such order. Such violation may be met with reprisals or punishment of the offenders as war-criminals.

<sup>1</sup> Martens, R., VII. p. 16.

## VI

## ARMISTICES

Grotius, III. c. 21, §§ 1-13, c. 22, § 8—Pufendorf, VIII. c. 7, §§ 3-12—Vattel, III. §§ 233-260—Hall, § 192—Lawrence, § 237—Phillimore, III. §§ 116-121—Halleck, II. pp. 311-319—Taylor, §§ 513 and 516—Wheaton, §§ 400-404—Bluntschli, §§ 688-699—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 531-544—Ullmann, § 158—Bonfils, Nos. 1248-1258—Despagnet, Nos. 562-565—Pradier-Fodéré, VII. Nos. 2889-2918—Rivier, II. pp. 362-368—Calvo, IV. § 2433-2449—Fiore, III. Nos. 1484-1494—Martens, II. § 127—Longuet, §§ 145-149—Mérignhac, pp. 230-239—Pillet, pp. 364-370—Kriegsgebrauch, pp. 41-44—Holland, War, Nos. 87-94.

§ 231. Armistices or truces, in the wider sense of the term, are all agreements of belligerent forces facing each other for a temporary cessation of hostilities for some purpose or another. They are in no wise to be compared with peace, and ought not to be called a temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen remains, therefore, intact, as does likewise the right to capture neutral vessels attempting to break a blockade, and the right to seize contraband of war. However, although all armistices are essentially alike in so far as they consist in cessation of hostilities, three different kinds must be distinguished—namely, (1) suspensions of arms, (2) general armistices, and (3) partial armistices.<sup>1</sup> It must be

Character  
and kinds  
of Armis-  
tices.

<sup>1</sup> This distinction, although it is, as will be seen from the following sections, absolutely necessary, is not made by several publicists. Holland, War, No. 87, says even: "There is no difference of meaning, according to British usage at least, between a 'truce,' an

emphasised that the Hague Regulations deal with armistices in their articles 36 to 41 on the whole very fragmentarily, so that the gaps need filling up from the old customary rules.

Suspensions of Arms.

§ 232. Suspensions of arms, in contradistinction to armistices in the narrower sense of the term, are such cessations of hostilities as are agreed upon between large or small military or naval forces for a very short time and regarding momentary and local military purposes only. Such purposes may be—collection of the wounded; burial of the dead; negotiation regarding surrender or evacuation of a defended place, or regarding an armistice in the narrower sense of the term; but may also be the creation of a possibility for a commander to ask for and receive instructions from a superior authority,<sup>1</sup> and the like. Suspensions of arms have nothing to do with political purposes, or with the war generally, since they are of momentary and local importance only. They exclusively concern those forces and that spot which are the object of the suspension of arms. The Hague Regulations do not specially mention suspensions of arms at all, since article 37 speaks of local armistices only, apparently comprising suspensions of arms among local armistices.

General Armistices.

§ 233. A general armistice is such a cessation of hostilities as, in contradistinction to suspensions of arms with their momentary and local military purposes, is agreed upon between belligerents for the whole of their forces and the whole region of war. General armistices are always conventions of vital

'armistice,' and a 'suspension of arms.' See also below, § 233.

<sup>1</sup> An instructive example of suspensions of arms for such purposes is furnished by the Convention between the German forces

besieging Belfort and the French forces holding this fortress during the Franco-German War, signed on February 13, 1871; see Martens, N.R.G., XIX. p. 646.

political importance affecting the whole of the war. They are regularly, although not necessarily, concluded for a political purpose, be it that negotiations of peace have ripened so far that the end of the war is in sight and that, therefore, military operations appear superfluous; or be it that the forces of either belligerent are exhausted and need rest; or that the belligerents have to face domestic difficulties, the settlement of which is more pressing than the continuation of the war; or be it another political purpose. Thus article 2 of the general armistice agreed upon at the end of the Franco-German War on January 28, 1871,<sup>1</sup> declared expressly the purpose of the armistice to be the creation of the possibility for the French Government to convoke a Parliamentary Assembly which could determine whether or not the war was to be continued or what conditions of peace should be accepted.

It must be specially observed that, for special reasons, small parts of the belligerent forces and small parts of the theatre of war may be specially excluded without detracting from the general character of the armistice, provided the bulk of the forces and the greater part of the region of war are included. Thus, article 1 of the above-mentioned general armistice at the end of the Franco-German war excluded specially all military operations in the Départements du Doubs, du Jura, de la Côte d'Or, and likewise the siege of Belfort. It should also be mentioned that in the practice of the belligerents the terms "suspension of arms" and "general armistice" are sometimes not sufficiently distinguished, but are interchangeable. Thus, for instance, the above-mentioned general armistice between France and

<sup>1</sup> Martens, N.R.G., XIX. p. 626.

Germany is entitled "Convention entre l'Allemagne et la France pour la suspension des hostilités, . . ." whereas the different articles of the Convention correctly always speak of an armistice, and whereas, further, an annexe to the Convention signed on January 29 is entitled<sup>1</sup> "Annexe à la Convention d'armistice."

Partial  
Armistices.

§ 234. Partial armistices are agreements upon cessations of hostilities which, on the one hand, are not concluded by belligerents for their whole forces and the whole region of war, and, on the other hand, do not merely serve, like suspensions of arms, momentary and local military purposes. They are armistices concluded by belligerents for a considerable part of their forces and front; they are always of political importance affecting the war in general; and they very often are, although they need not be, agreed upon for political purposes. Article 37 of the Hague Regulations apparently comprises partial armistices together with suspensions of arms under the term "local" armistices. A partial armistice may be concluded for the military or the naval forces only, for cessation of hostilities in the colonies only, for cessation of hostilities between two of the belligerents in case more than two are parties to the war, and the like. But it is always a condition that a considerable part of the forces and the region of war must be included, and that the purpose is not only a momentary one.

Competence to conclude Armistices.

§ 235. As regards the competence to conclude armistices, a distinction is necessary between suspensions of arms and general and partial armistices.

(1) Since the character and purpose of suspensions of arms are military, local, and momentary only,

<sup>1</sup> Martens, N.R.G., XIX. p. 636.

every commander is supposed to be competent to agree upon a suspension of arms, and no ratification on the part of the superior officers or other authorities is required. Even commanders of the smallest opposing detachments can arrange a suspension of arms.

(2) On the other hand, since general armistices are of vital political importance, only the belligerent Governments themselves or their commanders-in-chief are competent to conclude them, and ratification, whether specially stipulated or not, is necessary. Should a commander-in-chief conclude a general armistice which would not find ratification, hostilities can at once be taken up again without breach of faith, it being a matter of common knowledge that a commander-in-chief is not authorised to agree upon exclusion of ratification, unless he received special powers thereto.

(3) Partial armistices may be concluded by the commanders-in-chief of the respective forces, and ratification is not necessary, if not specially stipulated, the commanders being responsible to their own Governments in case they agree upon a partial armistice without being specially authorised thereto.

§ 236. No legal rule exists regarding the form of armistices, which may therefore be concluded either orally or in writing. However, the importance of general as well as partial armistices makes it advisable to conclude them by signing written documents containing all items which have been agreed upon. No instance is known of a general or partial armistice of modern times concluded otherwise than in writing. But suspensions of arms are often orally concluded only.

Form of  
Armistices.

§ 237. That all hostilities must cease is the obvious content of all kinds of armistices. Usually,

Contents  
of Armistices.

although not at all necessarily, the parties embody special conditions in the agreement instituting an armistice. If and so far as this has not been done, the import of armistices is for some parts much controverted. Everybody agrees indeed that belligerents during an armistice can, outside the line where the forces face each other, do everything and anything they like regarding defence and preparation of offence ; for instance, manufacture and import munitions and guns, drill recruits, build fortresses, concentrate or withdraw troops. But no unanimity exists regarding such acts as must be left undone or may be done within the very line where the belligerent forces face each other. The majority of writers, led by Vattel (III. § 245), maintain that in absence of special stipulations it is essentially implied in an armistice that within such line no alteration of the *status quo* shall take place which the other party, were it not for the armistice, could by application of force, for instance by a cannonade or by some other means, prevent from taking place. These writers consider it a breach of faith for a belligerent to make such alterations under the protection of the armistice. On the other hand, a small minority of writers, but led by Grotius (III. c. 21, § 7) and Pufendorf (VIII. 7, § 7), assert that cessation of hostilities and of further advance only are essentially implied in an armistice, all other acts such as strengthening of positions by concentration of more troops on the spot, erection and strengthening of defences, repairing of breaches of besieged fortresses, withdrawing of troops, making of fresh batteries on the part of besiegers without advancing, and the like, being allowed. As the Hague Regulations do not mention the matter, the controversy still remains unsettled. I believe the

opinion of the minority to be correct, since an armistice does not mean anything else than a cessation of actual hostilities, and it is for the parties agreeing upon an armistice to stipulate such special conditions as they think necessary or convenient. This applies particularly to the likewise controverted questions as to revictualling of besieged places and as to intercourse, commercial and otherwise, of the inhabitants of the region where actual fighting was going on before the armistice. As regards revictualling, it has been correctly maintained that, if it were not allowed, the position of the besieged forces would thereby be weakened during the very time of the armistice. But I cannot see why this should be an argument to hold revictualling permissible. The principle *vigilantibus jura sunt scripta* applies to armistices as well as to all other legal transactions. It is for the parties to prepare such arrangements as really suit their needs and wants. Thus, during the Franco-German War an armistice for twenty-five days proposed in November 1870 fell to the ground on the Germans refusing to grant the revictualling of Paris.<sup>1</sup> It seems to be the intention of the Hague Regulations that the parties should always stipulate those special conditions which they need. Article 39 pronounces this intention regarding intercourse, commercial and other, during armistices with the following words:—"It is for the contracting parties to settle in the terms of the armistice what communications may be held on the theatre of war with the population and with each other."

<sup>1</sup> See Pradier-Fodéré, VI. No. 2908, where the question of revictualling during an armistice is discussed at some length, and the

opinions of the different publicists from Grotius to our own days are quoted.



It must be specially mentioned that for the purpose of preventing the outbreak of hostilities during an armistice it is usual to agree upon so-called lines of demarcation<sup>1</sup>—that is, a small neutral zone between the forces facing each other which must not be entered by members of either force. But such lines of demarcation do not exist, if they are not specially stipulated by the armistice concerned.

Com-  
mence-  
ment of  
Armis-  
tices.

§ 238. In case the contrary is not stipulated, an armistice commences the very moment the agreement upon it is complete. But often the parties stipulate in the agreement the time from which the armistice shall begin. If this is done in so detailed a manner that the very hour of the commencement is mentioned, no cause for controversy is given. But sometimes the parties fix only the date by stipulating that the armistice shall last from one certain day to another, *e.g.* from June 15 to July 15. In such case the actual commencement is controverted. Most publicists maintain that in such case the armistice begins at 12 o'clock of the night from the 14th to the 15th of June, but Grotius (III. c. 21, § 4) maintains that it begins at 12 o'clock of the night from the 15th to the 16th of June.<sup>2</sup> To avoid difficulties, agreements concerning armistices ought, therefore, always to stipulate whether the first day is to be included in the armistice. Be that as it may, when the forces included in an armistice are dispersed over a very large area, the parties very often stipulate different dates of commencement for the different parts of the front, because it is not possible to announce the armistice at once to all the forces included. Thus,

<sup>1</sup> See Pradier-Fodéré, VII. No. 2897. The controversy turns up again with regard to the end of an armistice ; see below, § 240.

<sup>2</sup> See Pradier-Fodéré, VII. No. 2901.

for instance, article 1 of the general armistice at the end of the Franco-German War<sup>1</sup> stipulated its immediate commencement for the forces in and around Paris, but that with regard to the other forces its commencement should be delayed three days. Article 38 of the Hague Regulations enacts that an armistice must be notified officially and in good time to the competent authorities and the troops, and that hostilities are suspended immediately after the ratification or at a fixed date, as the case may be.

It happens sometimes that hostilities are carried on after the commencement of an armistice by forces which did not know of its commencement. In such cases the *status quo* at the date of the commencement of armistice has to be re-established as far as possible, prisoners made and enemy vessels seized being liberated, capitulations annulled, places occupied being evacuated, and the like; but the parties may, of course, stipulate the contrary.

§ 239. Any violation of armistices is prohibited, and constitutes an international delinquency, if ordered by the Governments concerned. In case an armistice is violated by members of the forces on their own account, the individuals concerned may be punished by the other party in case they fall into its hands. Be that as it may, the question must be answered, what general attitude is to be taken by one party, if the other violates the armistice? No unanimity exists regarding this point among the writers on International Law, many<sup>2</sup> asserting that in case of violation the other party can at once,

Violation  
of Armis-  
tices.

<sup>1</sup> Martens, N.R.G., XIX. p. 626. § 11; Vattel, III. § 242; Phillimore, II. § 121; Bluntschli, § 695;

<sup>2</sup> See, for instance, Grotius, III. Fiore, III. No. 1494. c. 21, § 11; Pufendorf, VIII. c. 7,

without giving notice, open hostilities again, others<sup>1</sup> maintaining that such party cannot do this, but has the right to denounce the armistice. The Hague Regulations endeavour to settle the controversy, article 40 enacting that any serious violation of an armistice by one of the parties gives the other the right to denounce it, and even, in case of urgency, to recommence hostilities at once. Three rules may be formulated out of this—(1) violations which are not serious do not even give the right to denounce an armistice; (2) serious violations do regularly empower the other party to denounce only the armistice, but not to take up at once hostilities without notice; (3) only in case of urgency is a party justified in recommencing hostilities without notice, when the other party has broken an armistice. But since the term “serious violation” and “urgency” lack a precise definition, it is practically left to the discretion of the injured party.

It must be specially observed that violation of an armistice committed by private individuals acting on their own initiative is to be distinguished from violation by members of the armed forces. In the former case the injured party has, according to article 41 of the Hague Regulations, only the right of demanding punishment of the offenders, and, if necessary, indemnity for the losses sustained.

End of  
Armistices.

§ 240. In case an armistice has been concluded for an indefinite period, the parties having made no stipulations regarding notice, the latter can be given at any time, and hostilities recommenced at once after notification. In most cases, however, armistices

<sup>1</sup> See, for instance, Calvo, IV. § 2436; Despagnet, No. 565 Pradier-Fodéré, VII. No. 2913.

are agreed upon for a definite period, and then they expire with such period without special notice, if the latter has not been specially stipulated. If, in case of an armistice for a definite period, the exact hour of the termination has not been agreed upon, but only the date, the armistice terminates at 12 o'clock P.M. of such date. In case an armistice has been arranged to last from one certain day to another, *e.g.* from June 15 to July 15, it is again<sup>1</sup> controverted whether July 15 is excluded or included. An armistice may, lastly, be concluded under a resolute condition, in which case the occurrence of the condition brings the armistice to an end.

<sup>1</sup> See above, § 238

## CHAPTER VI

### MEANS OF SECURING LEGITIMATE WARFARE

#### I

#### ON MEANS IN GENERAL OF SECURING LEGITIMATE WARFARE

Legiti-  
mate and  
Illegiti-  
mate  
Warfare.

§ 241. Since war is not a condition of anarchy and lawlessness, International Law requests that belligerents comply with its rules in carrying on their military and naval operations. As long and in so far as belligerents do this or not, their warfare is legitimate or illegitimate. Now, illegitimate acts and omissions can be committed by belligerent Governments themselves, by the commanders or members of their forces, and by their subjects not belonging to the forces. Experience teaches that on the whole illegitimate acts and omissions of some kind or other committed by single soldiers are unavoidable during war, since the passions which are roused by and during war will always carry away single individuals. But belligerents bear a vicarious responsibility for internationally wrongful acts of their soldiers, which turns into original responsibility when they refuse to repair the wrong done through punishing the offenders and, if necessary, indemnifying the sufferers.<sup>1</sup> The case in which belligerent Governments themselves commit illegitimate acts, as well as the cases in which

<sup>1</sup> See above, vol. I. §§ 149-150.

they refuse punishment for illegitimate acts of their soldiers constitute international delinquencies.<sup>1</sup> Now, if in time of peace an international delinquency is committed, the offended State can, if the worst comes to the worst, make war against the offender to enforce an adequate reparation.<sup>2</sup> But if an international delinquency is committed during warfare itself, no means whatever exist of enforcing a reparation.

§ 242. Yet practically legitimacy of warfare is, on the whole at least, secured through several means recognised by International Law. These means of securing legitimate warfare may be divided into two classes according to whether they fall under the category of self-help or not. Means belonging to the one class are:—reprisals; punishment of war crimes committed by enemy soldiers and other enemy subjects; the taking of hostages. To the other class belong:—complaints lodged with the enemy; complaints lodged with neutral States; good offices, mediation, and intervention on the part of neutral States. These means do, as I have said, secure the legitimacy of warfare on the whole, because it is in the very interest of either belligerent to prevent the enemy from getting a justified opportunity of making use of them. On the other hand, isolated illegitimate acts of individual enemy soldiers will always occur; but they will in many cases find their punishment either by one party or the other to the war. As regards hostile acts of private enemy individuals not belonging to the armed forces, belligerents have a right<sup>3</sup> to consider and punish them severely as acts of illegitimate warfare.

How Legitimate Warfare is on the whole secured.

<sup>1</sup> See above, vol. I. § 151.

<sup>2</sup> See above, vol. I. § 156.

<sup>3</sup> See below, § 254.

## II

COMPLAINTS, GOOD OFFICES AND MEDIATION,  
INTERVENTION

Com-  
plaints  
lodged  
with the  
Enemy.

§ 243. Commanders of forces engaged in hostilities frequently lodge complaints with each other regarding single acts of illegitimate warfare committed by members of their forces, such as abuses of the flag of truce, violations of such flag or of the Geneva Convention, and the like. The complaint is sent to the enemy under the protection of a flag of truce, and the interest every commander takes in the legitimate behaviour of his troops will always make him attentive to complaints and punish the offenders, provided the complaints concerned are found to be justified. Very often, however, it is impossible to verify the facts complained of, and then assertion of certain facts by one party and their denial by the other face each other without there being any way of solving the difficulty. It also often happens during war that the belligerent Governments lodge with each other mutual complaints of illegitimate acts and omissions. Since diplomatic intercourse is broken off during war, such complaints are either sent to the enemy under the protection of a flag of truce or through a neutral<sup>1</sup> State which lends its good offices. But here too indignant assertion and emphatic denial frequently face each other without there being a way of solving the conflict.

Com-  
plaints  
lodged  
with  
Neutrals.

§ 244. If certain grave illegitimate acts or omissions of warfare occur, belligerents frequently resort

<sup>1</sup> Thus, in October 1904, during the Russo-Japanese War, Japan sent a complaint concerning the alleged use of Chinese clothing on the part of Russian troops to the Russian Government, through the intermediary of the United States of America.

to complaints lodged with neutral States, either asking their good offices, mediation, or intervention to make the enemy comply with the laws of war, or simply drawing their attention to the facts. Thus, at the beginning of the Franco-German War, France lodged a complaint with Great Britain and asked her intervention on account of the intended creation of a volunteer fleet on the part of Germany, which France considered a violation of the Declaration of Paris.<sup>1</sup> Conversely, in January 1871, Germany, in a circular addressed to her diplomatic envoys abroad, and to be communicated to the respective neutral Governments, complained of twenty-one cases in which the French forces had, deliberately and intentionally it was alleged, fired on bearers of a flag of truce.

§ 245. Complaints lodged with neutral States may have the effect that one or more of the latter lend their good offices or their mediation to the belligerents for the purpose of settling such conflict as arose out of the alleged illegitimate acts or omissions of warfare, thus preventing them from resorting to reprisals. Such good offices and mediation would not differ from those which settle a difference between States in time of peace and which have been discussed above in §§ 7-11; they are friendly acts in contradistinction to intervention, which is dictatorial interference for the purpose of making the respective belligerents comply with the laws of war.

§ 246. There can be no doubt that neutral States, whether a complaint has been lodged with them or not, can either singly, or jointly and collectively, exercise intervention in the case of illegitimate acts or omissions of warfare being committed by a belligerent Government, or committed by members of

Good  
Offices and  
Media-  
tion.

Interven-  
tion on the  
part of  
Neutrals.

<sup>1</sup> See above, § 84.



belligerent forces without the Governments concerned punishing the offenders. It will be remembered that it has been stated above in Vol. I. § 135 that other States have a right to intervene in case a State violates in time of peace or war those principles of the Law of Nations which are universally recognised. There is not the slightest doubt that such principles of International Law are endangered in case a belligerent Government commits acts of illegitimate warfare, or does not punish the offenders in case such acts are committed by members of its armed forces. But apart from this, the Hague Regulations let illegitimate acts of warfare on land now appear as an affair which is by right an affair of all signatory States to the Convention, and therefore, in case of war between signatory States, the neutral signatory States certainly would have a right of intervention if acts of warfare were committed which are illegitimate according to the Hague Regulations. It must, however, be specially observed that any such intervention, if it ever occurred, has nothing to do with the war in general and does not make the intervening State a party to the war, but concerns the international delinquency only which was committed by the one belligerent through acts of illegitimate warfare.

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## III

## REPRISALS

Vattel, III. p. 142—Hall, § 135—Westlake, Chapters, pp. 253-258—Taylor, §§ 487 and 507—Wharton, III. § 348—Bluntschli, §§ 567, 580, 654, 685—Lueder in Holtzendorff, IV. p. 392—Bonfil, Nos. 1018-1026—Despagnet, No. 544—Rivier, II. pp. 298-299—Calvo, IV. §§ 2041-2043—Martens, II. § 121—Mérignhac, pp. 210-218—Holland, War, Nos. 99, 100.

§ 247. Whereas reprisals in time of peace are to be distinguished from retorsion and are injurious acts committed for the purpose of compelling a State to consent to a satisfactory settlement of a difference created through an international delinquency,<sup>1</sup> reprisals between belligerents are retaliation of an illegitimate act of warfare, whether constituting an international delinquency or not, for the purpose of making the enemy in future comply with the rules of legitimate warfare. Reprisals between belligerents are terrible means, because they are in most cases directed against innocent enemy individuals, who must suffer for real or alleged offences for which they are not responsible. But reprisals cannot be dispensed with, because without them illegitimate acts of warfare would be innumerable. As matters stand, every belligerent and every member of his forces knows for certain that reprisals are to be expected in case they violate the rules of legitimate warfare. And when nevertheless an illegal act occurs and is promptly met with reprisals as a retaliation, human nature would not be what it is if such retaliation did not act as a deterrent against a repetition of illegitimate acts.

Reprisals  
between  
Belli-  
gerents in  
contradistinction to  
Reprisals  
in time of  
Peace.

<sup>1</sup> See above, §§ 33 and 42.

Reprisals  
admissible  
for every  
Illegiti-  
mate Act  
of War-  
fare.

§ 248. Whereas reprisals in time of peace are admissible for international delinquencies only, reprisals between belligerents are at once admissible for every and any act of illegitimate warfare, whether the act constitutes an international delinquency or not. It is in the consideration of the injured belligerent whether he will at once resort to reprisals, or, before doing so, he will lodge complaints with the enemy or neutral States. Practically, however, a belligerent will rarely resort at once to reprisals, provided the violation of the rules of legitimate warfare is not very grave and the safety of his troops does not at once require drastic measures. Thus, the Germans during the Franco-German War frequently bombarded and fired, by way of reprisals, undefended open villages where their soldiers were treacherously killed by enemy individuals in ambush who did not belong to the armed forces. And Lord Roberts, <sup>Do. 24</sup> during the South African War, ordered, <sup>by way of</sup> by way of reprisals, the destruction of houses and farms in the vicinity of the place where damage was done to the lines of communication.

Danger of  
Arbitrari-  
ness in  
Reprisals.

§ 249. The right to exercise reprisals carries with it great danger of arbitrariness, for either the alleged facts which make belligerents resort to reprisals are often not sufficiently verified, or the rules of war which they consider violated by the enemy are sometimes not generally recognised, or the act of reprisals performed is often excessive compared with the precedent act of illegitimate warfare. Three cases may illustrate this danger.

(1) In 1782 Joshua Huddy, a captain in the army of the American insurgents, was taken prisoner by

<sup>1</sup> See section 4 of the Proclamation of June 19, 1900 (Martens, N.R.G., 2nd ser., XXXII. p. 147).

loyalists and handed over to a Captain Lippencott for the ostensible purpose of being exchanged, but was arbitrarily hanged. The commander of the British troops had Lippencott arrested, and ordered him to be tried for murder. Lippencott was, however, acquitted by the court-martial, as there was evidence that Lippencott, who commanded the execution of Huddy, acted under orders of a Board which he was bound to obey. Thereupon some British officers who were prisoners of war in the hands of the Americans were directed to cast lots to determine who should be executed by way of reprisals for the execution of Huddy. The lot fell on Captain Asgill, a young officer only nineteen years old, and he would have been executed but for the mediation of the Queen of France, who saved his life.<sup>1</sup>

(2) "The British Government, having sent to England, early in 1813, to be tried for treason, twenty-three Irishmen, naturalised in the United States, who had been captured on vessels of the United States, Congress authorised the President to retaliate. Under this act, General Dearborn placed in close confinement twenty-three prisoners taken at Fort George. General Prevost, under express directions of Lord Bathurst, ordered the close imprisonment of double the number of commissioned and non-commissioned United States officers. This was followed by a threat of 'unmitigated severity against the American citizens and villages' in case the system of retaliation was pursued. Mr. Madison having retorted by putting in confinement a similar number of British officers taken by the United States, General Prevost immediately retorted by subjecting

<sup>1</sup> See the case reported in pp. 311-321. See also Phillimore, *Martens, Causes Célèbres*, III. III. § 105.

to the same discipline all his prisoners whatsoever. . . . A better temper, however, soon came over the British Government, by whom this system had been instituted. A party of United States officers, who were prisoners of war in England, were released on parole, with instructions to state to the President that the twenty-three prisoners who had been charged with treason in England had not been tried, but remained on the usual basis of prisoners of war. This led to the dismissal on parole of all the officers of both sides."<sup>1</sup>

(3) During the Franco-German War the French had captured forty German merchantmen, and made their captains and crews prisoners of war. Count Bismarck, who considered it against International Law to retain these men as prisoners, demanded their liberation, and when the French refused this, ordered by way of reprisals forty French private individuals of local importance to be arrested and to be sent as prisoners of war to Bremen, where they were kept to the end of the war. Count Bismarck was decidedly wrong,<sup>2</sup> since France had in no way committed an illegal act by retaining the German crews as prisoners of war.<sup>3</sup>

Proposed  
Restriction  
of  
Reprisals.

§ 250. The Hague Regulations do not mention reprisals at all because the Brussels Conference of 1874, which accepted the unratified Brussels Declaration, had struck out several sections of the Russian draft code regarding reprisals. These original sections<sup>4</sup> (69-71) stipulated—(1) that reprisals should

<sup>1</sup> See Wharton, III. § 348a.

<sup>2</sup> That Bismarck's standpoint was wrong has been pointed out above in § 201. Some German writers, however, take his part; see, for instance, Lueder in Holtzendorff, IV. p. 479, note 6.

<sup>3</sup> The case is one of reprisals, and has nothing to do with the taking of hostages; see below, § 258.

<sup>4</sup> See Martens, N.R.G., 2nd ser. IV. pp. 1 139, 207.

be admitted only in extreme cases of absolutely certain violations of the rules of legitimate warfare ; (2) that the acts performed by way of reprisals must not be excessive, but in proportion to the respective violation ; (3) that reprisals should be ordered by commanders-in-chief only. Articles 85 and 86 of the Manual of the Laws of War, adopted by the Institute of International Law,<sup>1</sup> propose the following rules :— (1) Reprisals are to be prohibited in case reparation is given for the damage done by an illegal act ; (2) in grave cases, in which reprisals are an imperative necessity, they must never exceed the degree of the violation committed by the enemy ; (3) they can only be resorted to with the authorisation of the commander-in-chief ; (4) they must in every case respect the laws of humanity and of morality. In the face of the arbitrariness with which, according to the present state of International Law, reprisals may be exercised, it cannot be denied that an agreement upon some precise rules regarding reprisals is an imperative necessity.

#### IV

#### PUNISHMENT OF WAR CRIMES<sup>2</sup>

§ 251. In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as members of armed forces who have done no wrong, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by

Concep-  
tion of  
War  
Crimes.

<sup>1</sup> See *Annuaire*, V. p. 174.

<sup>2</sup> Writers on the Law of Nations have hitherto not systematically treated of the question of War Crimes and their punishment.

See, however, Hall, § 135 ; Blunt schli, §§ 627-643A ; Holland, War Nos. 97-98 ; Landa, in R.I., X. (1878), pp. 182-184.

the enemy on capture of the offenders. It must, however, be emphasised that the term war crime is used, not in the moral sense of the term crime, but only in a technical legal sense, on account of the fact that these acts may be met with punishment by the enemy. For, although among the acts called war crimes are many which, such as abuse of a flag of truce or assassination of enemy soldiers for instance, are crimes in the moral sense of the term, there are others which, such as taking part in a levy *en masse* on territory occupied by the enemy for instance, may be highly praiseworthy patriotic acts. Because every belligerent can and actually must in the interest of his own safety punish these acts, they are termed war crimes, whatever may be the motive, the purpose, and the moral character of the respective act.<sup>1</sup>

Different  
kinds of  
War  
Crimes.

§ 252. However, in spite of the uniform qualification of these acts as war crimes, four different kinds of war crimes must be distinguished on account of the essentially different character of the acts. Violations of recognised rules regarding warfare committed by members of the armed forces belong to the first kind; all hostilities in arms committed by individuals who are not members of the enemy armed forces constitute a second kind; espionage and war treason belong to the third; and all marauding acts belong to the fourth kind.

Violations  
of Rules  
regarding  
Warfare.

§ 253. Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy; the latter can, however, resort to reprisals. In case members of

<sup>1</sup> See above, § 57.

forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.

The following are the more important violations that may occur:

(1) Making use of poisoned or otherwise forbidden arms and ammunition.

(2) Killing or wounding soldiers disabled by sickness or wounds, or who have laid down arms and surrendered.

(3) Assassination, and hiring of assassins.

(4) Treacherous request for quarter, or treacherous feigning of sickness and wounds.

(5) Ill-treatment of prisoners of war, of the wounded and sick. Appropriation of such of their money and valuables as are not public property.

(6) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property, and especially pillaging.

(7) Disgraceful treatment of dead bodies on the battlefields. Appropriation of such money and other valuables found upon dead bodies as are not public property, nor arms, ammunition, and the like.

(8) Appropriation and destruction of property belonging to museums, hospitals, churches, schools, and the like.

(9) Assault, siege, and bombardment of undefended open towns and other habitations.

(10) Unnecessary bombardment of such hospitals and buildings devoted to religion, art, science, and charity, as are indicated by particular signs notified to the besiegers bombarding a defended town.

(11) Violations of the Geneva Convention.



(12) Attack on or sinking of enemy vessels which have hauled down their flags as a sign of surrender. All attack on enemy merchantmen without previous request to submit to visit.

(13) Attack or seizure of hospital ships, and all other violations of the Hague Convention for the adaptation to naval warfare of the principles of the Geneva Convention.

(14) Unallowed destruction of enemy prizes.<sup>1</sup>

(15) Use of the enemy uniforms and the like during battle, use of the enemy flag during attack by a belligerent vessel.

(16) Violation of enemy individuals furnished with passports or safe-conducts, violation of safeguards.

(17) Violation of bearers of flags of truce.

(18) Abuse of the protection granted to flags of truce.

(19) Violation of cartels, capitulations, and armistices.

(20) Breach of parole.

Hostilities  
in Arms  
by Private  
Indi-  
viduals.

§ 254. Since International Law is a law between States only and exclusively, no rules of International Law can exist which prohibit private individuals from taking up arms and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileged treatment of members of armed forces, and the enemy has according to a customary rule of International Law the right to consider and punish such individuals as war criminals. Hostilities in arms committed by private individuals are, therefore, war crimes, not because they really are violations of recognised rules regarding warfare, but because the enemy has the right to consider and

<sup>1</sup> Unjustified destruction of neutral prizes—see below, § 431—is not a war crime, but is nevertheless an international delinquency, if ordered by the belligerent government.

punish them as acts of illegitimate warfare. The conflict between praiseworthy patriotism on the part of such individuals and the safety of the enemy troops does not allow of any solution. On the one hand, it would be unreasonable for International Law to impose the duty upon belligerents to forbid on their part the taking up of arms by their private subjects, because it may occasionally be of the greatest value to a belligerent, especially for the purpose of freeing a country from the enemy who has militarily occupied it. On the other hand, the safety of his troops compels the enemy to consider and punish such hostilities as acts of illegitimate warfare, and International Law gives him a right to do so.

It is usual to make a distinction between hostilities in arms on the part of private individuals against an invading or retiring enemy on the one hand, and, on the other, hostilities in arms committed on the part of the inhabitants against an enemy occupying a conquered territory. In the latter case one speaks of war rebellion, whether inhabitants take up arms singly or rise in a so-called levy *en masse*. Articles 1 and 2 of the Hague Regulations make the greatest possible concessions regarding hostilities committed by irregulars.<sup>1</sup> Beyond the limits of these concessions belligerents will never be able to go without the greatest danger to their troops.

§ 255. Article 24 of the Hague Regulations enacts now the old customary rule that a belligerent has a right to employ all the methods necessary to obtain information, and these methods include espionage and treason. But this right stands face to face with the right to consider and punish such enemy individuals, whether soldiers or ~~others~~ committing acts of espionage

Espionage  
and War  
Treason.

<sup>1</sup> See above, § 80.

or treason, as war criminals. There is an insoluble and inextricable conflict between the necessity of obtaining information on the one hand, and self-preservation on the other; and accordingly espionage and treason, as has been explained above in § 159, bear a twofold character. On the one hand, International Law gives a right to belligerents to make use of espionage and treason. On the other hand, however, the same law gives a right to belligerents to consider espionage and treason within their lines, committed by enemy soldiers or enemy private individuals, as acts of illegitimate warfare, and consequently punishable.

Espionage has already been treated above in §§ 159-161. War treason may be committed in different ways. The following are the chief cases of war treason that may occur:—

- (1) Information of any kind given to the enemy.
- (2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy.
- (3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door to a defended habitation, by repairing a destroyed bridge, or otherwise.
- (4) Attempt to induce soldiers to desertion, to surrender, to serve as spies, and the like, and negotiating desertion, surrender, and espionage offered by soldiers.
- (5) Attempt to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe.
- (6) Liberation of enemy prisoners of war.
- (7) Conspiracy against the armed forces or single officers and members of them.
- (8) Wrecking of military trains, destruction of the lines of communication or of the telegraphs or telephones in the interest of the enemy, and the destruction of any war material for the same purpose.

(9) Circulation of enemy proclamations dangerous to the interests of the belligerent concerned.

(10) Intentional false guidance of troops, whether the guide was enforced to his task or offered his services voluntarily.

(11) Rendering courier or similar services to the enemy.

It must be specially observed that enemy soldiers—in contradistinction to enemy private individuals—can only be punished for war treason when they have committed the act of treason during their stay within a belligerent's lines under disguise. If, for instance, a party of two soldiers in uniform are sent into the rear of the enemy for the purpose of destroying a bridge, they cannot, when caught by the enemy, be punished for war treason, because they have committed an act of legitimate warfare. But if they change their uniforms for plain clothes and appear thereby to be members of the peaceful private population, they may be punished for war treason. A remarkable case of this kind occurred in the summer of 1904, during the Russo-Japanese War. Two Japanese disguised in Chinese clothes were caught in the attempt to destroy, with the aid of dynamite, a railway bridge in Manchuria, in the rear of the Russian forces. Brought before a court-martial, they confessed themselves to be Ishomo Jokoko, 43 years of age, a Major on the Japanese General Staff, and Jersko Jokki, 31 years of age, a Captain on the Japanese General Staff. They were convicted, and condemned to be hanged, but the punishment was commuted and they were shot. All the newspapers which reported this case reported it as a case of espionage, but it is in fact one of war treason. Although the two officers were in disguise, their

conviction for espionage was impossible according to article 29 of the Hague Regulations, provided, of course, they were court-martialled for no other act than the attempt to destroy a bridge.

**Maraud-  
ing.**

§ 256. Marauders are individuals roving either singly or collectively in bands over battlefields, or following in quest of booty forces in advance or retreat. They have nothing to do with warfare in the strict sense of the term, but they are an unavoidable accessory to warfare and frequently consist of soldiers who have left their corps. Their acts are considered acts of illegitimate warfare, and their punishment takes place in the interest of the safety of either belligerent.

**Mode of  
Punish-  
ment of  
War  
Crimes.**

§ 257. All war crimes may be punished with death, but belligerents may, of course, pronounce a more lenient punishment or commute a verdict of death into a more lenient penalty. If this is done and imprisonment takes the place of capital punishment, the question arises whether such convicts must be released at the end of the war, although their term of imprisonment has not yet expired. Some publicists<sup>1</sup> answer this question in the affirmative, maintaining that it could never be lawful to inflict a penalty extending beyond the duration of the war. But I believe that the question has to be answered in the negative. If a belligerent has a right to pronounce capital punishment, it is obvious that he can select a more lenient penalty and carry the latter out even beyond the duration of the war. And it would in no wise be in the interest of humanity to deny this right, for otherwise belligerents would have always to pronounce and carry out capital punishment in the interest of self-preservation.

<sup>1</sup> See, for instance, Hall, § 135, p. 432.

## V

## TAKING OF HOSTAGES

Hall, §§ 135 and 156—Taylor, § 525—Bluntschli, § 600—Lueder in Holtzendorff, IV. pp. 475-477—Klüber, §§ 156 and 247—G. F. Martens, II. 277—Ullmann, § 155—Bonfile, Nos. 1145 and 1151—Pradier-Fodéré, VII. Nos. 2843-2848—Rivier, II. p. 302—Calvo, IV. §§ 2158-2160—Fiore, III. Nos. 1363-1364—Martens, II. § 119—Longuet, § 84—Kriegsgebrauch, pp. 49, 50.

§ 258. The practice of taking hostages as a means of securing legitimate warfare prevailed in former times much more than nowadays. It was frequently resorted to in all cases, such as capitulations and armistices for instance, in which belligerent forces depended more or less upon each other's faith. To make sure that no perfidy was intended, officers or prominent private individuals were taken as hostages who could be held responsible with their lives for any perfidy committed by the enemy. This practice has totally disappeared, and will hardly be revived. But this former practice must not be confounded with the still continued practice of seizing enemy individuals for the purpose of making them the object of reprisals. Thus, when in 1870, during the Franco-German War, Count Bismarck ordered forty French notables to be seized and to be taken away into captivity as a retaliation upon the French for refusing to liberate the crews of forty captured merchantmen, these forty French notables were not taken as hostages, but were made the object of reprisals.<sup>1</sup>

Former  
Practice  
of taking  
Hostages.

§ 259. A new practice of taking hostages was resorted to by the Germans in 1870 during the

Modern  
Practice  
of taking  
Hostages.

<sup>1</sup> The case has been discussed above in § 249. All the French writers who comment upon this case, however, make the mistake of enumerating it as an instance of the taking of hostages.

Franco-German War for the purpose of securing the safety of forces against possible hostile acts on the part of private inhabitants of occupied enemy territory. Well-known men of prominence were seized and retained in the expectation that the population would refrain from hostile acts out of regard for the fate of the hostages. Thus, when unknown people frequently wrecked the trains transporting troops, the Germans seized prominent enemy citizens and put them on the engines of trains to prevent the latter from being wrecked, a means which always proved effective and soon put a stop to further train-wrecking. The same practice was resorted to, although for a short time only, by Lord Roberts<sup>1</sup> in 1900 during the South African War. This practice has, apart from a few German writers, been condemned by the publicists of the whole world. But, with all due deference to the authority of so many prominent men, I cannot agree with their opinion. Matters would be different if hostages were seized and exposed to dangers for the purpose of preventing legitimate hostilities on the part of members of the armed forces of the enemy. But nobody can deny that train-wrecking on occupied enemy territory by private enemy individuals is an act which a belligerent is justified in considering and punishing as war treason.<sup>2</sup> It is for the purpose of guarding himself against an act of illegitimate warfare that these hostages are put on the engines. The danger they are exposed to comes from their fellow-citizens, who are informed of the fact that hostages are on the engines

<sup>1</sup> See section 3 of the Proclamation of Lord Roberts; dated Praetoria, June 19, 1900; but this section was repealed by Proclama-

tion of July 29, 1900. See Martens, N.R.G., 2nd ser., XXXII. (1905), pp. 147 and 149.

<sup>2</sup> See above, § 255, No. 8.

and ought therefore to refrain from wrecking the trains. It cannot and will not be denied that the measure is a hard one, and makes individuals liable to suffer for acts for which they are not responsible. But the safety of his troops and lines of communication is at stake for the belligerent concerned, and I doubt, therefore, whether even the most humane commanders will be able to dispense with this measure, since it alone has proved effective. And it must further be taken into consideration that the amount of cruelty contained in it is in no wise greater than in reprisals where also innocent individuals must suffer for illegitimate acts for which they are not responsible. And is it not more reasonable to prevent train-wrecking by putting hostages on the engines than to resort to reprisals for wreckage of trains? For there is no doubt that a belligerent is justified in resorting to reprisals<sup>1</sup> in each case of train-wrecking by private enemy individuals.<sup>2</sup>

<sup>1</sup> See above, § 248.

<sup>2</sup> Belligerents sometimes take hostages to secure compliance with requisitions, contributions, ransom bills, and the like, but such cases have nothing to do

with illegitimate warfare; see above, p. 122, note 1, and p. 176, note 8. The Hague Regulations, do not at all mention the taking of hostages for any purpose.



## CHAPTER VII

### END OF WAR, AND POSTLIMINIUM

#### I

#### ON TERMINATION OF WAR IN GENERAL

Hall, § 197—Lawrence, § 238—Phillimore, III. § 510—Taylor, § 580—Heffter, § 176—Kirchenheim in Holtzendorff, IV. pp. 791-792—Ullmann, § 169—Bonfilis, No. 1692—Despagnet, No. 603—Calvo, V. § 3115—Fiers, *M.* No. 1693—Martens, II. § 128—Longuet, § 155.

War a  
Tempo-  
rary Con-  
dition.

§ 260. The normal condition between two States being peace, war can never be more than a temporary condition; whatever may have been the cause or causes of a war, the latter can naturally not last for ever. For either the purpose of war will be realised and one belligerent will be overpowered by the other, or both will sooner or later be so exhausted by their exertions that they will desist from continuing the struggle. But nevertheless wars may last for many years, although of late European wars have become shorter and shorter. The shortening of European wars in recent times is the result of several factors, the more important of which are:—the conscription on which are based the armies of all the great European Powers, Great Britain excepted; the net of railways extending over all European countries, which enables a much quicker transport of troops on enemy territory; lastly, the vast numbers of the opposing forces which usually hasten the decisive battle.

§ 261. Be that as it may, a war may be terminated in three different ways. Belligerents may, first, abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty. Or, secondly, belligerents may formally establish the condition of peace between each other through a special treaty of peace. Or, thirdly, a belligerent may end the war through subjugation of his adversary.<sup>1</sup>

Three  
Modes of  
Termination  
of  
War.

## II

### SIMPLE CESSATION OF HOSTILITIES

Hall, § 203—Phillimore, III. § 511—Halleck, II. p. 468—Taylor, § 584—Bluntschli, § 700—Heffter, § 177—Kirchenheim in Holtzendorff, IV. p. 793—Ullmann, § 169—Bonfils, No. 1693—Despagnet, No. 603—Rivier, II. pp. 435-436—Calvo, V. § 3116—Fiore, III. No. 1693—Martens, II. § 128—Longuet, § 155—Mérignhac, p. 323—Pillet, p. 370.

§ 262. The regular modes of termination of war are treaties of peace or subjugation, but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end. Thus ended in 1716 the war between Sweden and Poland, in 1720 the war between Spain and France, in 1801 the war between Russia and Persia, in 1867 the war between France and Mexico. And it may also be mentioned that, whereas the war between Prussia and several

Excep-  
tional  
Occur-  
rence of  
simple  
Cessation  
of Hos-  
tilities.

<sup>1</sup> That a civil war may come to an end through simple cessation of hostilities or through a treaty of peace need hardly be mentioned. But it is of importance to state the fact that there is a difference between civil war and other war concerning the

third mode of ending war, namely, subjugation. For to terminate a civil war, conquest *and* annexation, which together make subjugation, is unnecessary (see below, § 264), but conquest alone is sufficient.

German States in 1866 came to an end through subjugation of some States and through treaties of peace with others, Prussia has never concluded a treaty of peace with the Principality of Lichtenstein, which was also a party to the war. Although such termination of war through simple cessation of hostilities is for many reasons inconvenient, and is, therefore, regularly avoided, it may nevertheless in the future as in the past occasionally occur.

Effect of  
Termination of  
War  
through  
simple  
Cessation  
of Hostilities.

§ 263. Since in the case of termination of war through simple cessation of hostilities no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the *status* which existed between the parties before the outbreak of war, the *status quo ante bellum*, should be revived, or the *status* which exists between the parties at the time when they simply ceased hostilities, the *status quo post bellum* (the *uti possidetis*), can be upheld. The majority of publicists<sup>1</sup> correctly maintain that the *status* which exists at the time of cessation of hostilities becomes silently recognised through such cessation, and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance regarding enemy territory militarily occupied by a belligerent at the time hostilities cease. According to the correct opinion such territory can be annexed by the occupier, the adversary through the cessation of hostilities having dropped all rights he possessed over such territory. On the other hand, this termination of war through cessation of hostilities contains no decision regarding such claims of the parties as have not been settled by the actual position of affairs at the termination of

<sup>1</sup> See, however, Phillimore, III. *status quo ante bellum* has to be § 511, who maintains that the revived.

hostilities, and it remains with the parties to settle them by special agreement or to let them stand over.

### III

#### SUBJUGATION

Vattel, III. §§ 199-203—Hall, §§ 204-205—Lawrence, § 98—Phillimore, III. § 512—Halleck, I. pp. 467-498—Taylor, §§ 220, 585-588—Walker, § 11—Wheaton, § 165—Bluntschli, §§ 287-289, 701-702—Heffter, § 178—Kirchenheim in Holtzendorff, IV. p. 792—Liszt, § 10—Ullmann, §§ 81 and 169—Bonfile, Nos. 535 and 1694—Despagnet, Nos. 395-398, 603—Rivier, II. pp. 436-441—Calvo, V. §§ 3117-3118—Fiore, II. Nos. 863, III. No. 1693—Martens, I. § 91, II. § 128—Longuet, § 155—Mérignhac, p. 324—Pillet, p. 371—Holtzendorff, "Eroberung und Eroberungsrecht" (1871)—Heimburger, "Der Erwerb der Gebietshoheit" (1888), pp. 121-132—Westlake, in "The Law Quarterly Review," XVII. (1901), p. 392.

§ 264. Subjugation must not be confounded with conquest, although there can be no subjugation without conquest. Conquest is taking possession of enemy territory through military force. Conquest is completed as soon as the territory concerned is effectively<sup>1</sup> occupied. Now it is obvious that conquest of a part of enemy territory has nothing to do with subjugation, because the enemy may well reconquer it. But even the conquest of the whole of the enemy territory need not necessarily include subjugation. For, first, in a war between more than two belligerents the troops of one of them may evacuate their country and join the army of allies, so that the armed contention is continued, although the territory of one of the allies is completely conquered.

Subjugation in contradistinction to Conquest.

<sup>1</sup> The conditions of effective jugation as a mode of acquisition occupation have been discussed of territory, see above, vol. I. §§ above in § 167. Regarding sub- 236-241.

Again, a belligerent, although he has annihilated the forces, conquered the whole of the territory of his adversary, and thereby has actually brought the armed contention to an end,<sup>1</sup> may not nevertheless exterminate the enemy State by annexing the conquered territory, but may conclude a treaty of peace with the expelled or imprisoned head of the defeated State, re-establish the latter's Government, and hand the whole or a part of the conquered territory over to it. Subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may, therefore, correctly be defined as *extermination in war of one belligerent by another through annexation<sup>2</sup> of the former's territory after conquest, the enemy forces having been annihilated.*<sup>3</sup>

Subjugation a formal End of War.

§ 265. Although complete conquest, together with annihilation of the enemy forces, brings the armed contention, and thereby the war, actually to an end, the formal end of the war is thereby not yet realised, as everything depends upon the resolution of the victor regarding the fate of the vanquished State. If he be willing to re-establish the captive or expelled head of the vanquished State, it is a treaty of peace concluded with the latter which terminates the war. But if he desires to acquire the whole of the conquered territory for himself, he annexes it, and

<sup>1</sup> The continuation of guerilla war after the termination of a real war is a fact which has been discussed above in § 60.

<sup>2</sup> That conquest alone is sufficient for the termination of civil wars has been pointed out above in p. 275, note 1.

<sup>3</sup> It should be mentioned that a premature annexation may be-

come valid through the occupation in question becoming soon afterwards effective. Thus, although the annexation of the South African Republic, on September 1, 1900, was premature, it became valid through the occupation becoming effective in 1901. See above, p. 172, note 1.

thereby formally ends the war through subjugation. That the expelled head of the vanquished State protests and keeps up his claims, matters as little as eventual protests on the part of neutral States. These protests may be of political importance for the future, legally they are of no importance at all.

History presents numerous instances of subjugation. Although nowadays no longer so frequent as in former times, subjugation is not at all of rare occurrence. Thus, modern Italy came into existence through the subjugation by Sardinia in 1859 of the Two Sicilies, the Grand Dukedom of Tuscany, the Dukedoms of Parma and Modena, and in 1870 the Papal States. Thus, further, Prussia subjugated in 1866 the Kingdom of Hanover, the Dukedom of Nassau, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Main. And Great Britain annexed in 1900 the Orange Free State and the South African Republic.<sup>1</sup>

<sup>1</sup> Since Great Britain annexed these territories in 1900, the agreement of 1902, regarding "Terms of Surrender of the Boer Forces in the Field"—see Parliamentary Papers, South Africa, 1902, Cd. 1096—is not a treaty of peace, and the South African War came formally to an end through subjugation, although—see above, p. 172, note 1—the proclamation of the annexation was somewhat premature. The agreement em-

bodying the terms of surrender of the routed remnants of the Boer forces has, therefore, no internationally legal basis (see also below, p. 287, note 1). The case would be different if the British Government had really—as Sir Thomas Barclay asserts in *The Law Quarterly Review*, XXI. (1905), pp. 303 and 307—recognised the existence of the Government of the South African Republic down to May 31, 1902.

## IV

## TREATY OF PEACE

Grotius, III. c. 20—Vattel, IV. §§ 9-18—Phillimore, III. §§ 513-516—Halleck, I. pp. 306-324—Taylor, §§ 590-592—Wheaton, §§ 538-543—Bluntschli, §§ 703-707—Heffter, § 179—Kirchenheim in Holtzendorff, IV. pp. 794-804—Ullmann, § 170—Bonfilis, Nos. 1696-1697, 1703-1705—Despagnet, Nos. 604-609—Rivier, II. pp. 443-453—Calvo, V. §§ 3119-3136—Fiore, III. Nos. 1694-1700—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 324-329—Pillet, pp. 372-375.

Treaty of  
Peace the  
most  
frequent  
End of  
War.

§ 266. Although occasionally war ends through simple cessation of hostilities, and although subjugation is not at all rare and irregular, the most frequent end of wars is a treaty of peace. Many publicists correctly call a treaty of peace the normal mode of terminating war. On the one hand, simple cessation of hostilities is certainly an irregular mode. Subjugation, on the other hand, is in most cases either not within the scope of the intention of the victor or not realisable. And it is quite reasonable that a treaty of peace should be the normal end of wars. States which are driven from disagreement to war will, sooner or later, when the fortune of war has given its decision, be convinced that the armed contention ought to be terminated. Thus a mutual understanding and agreement upon certain terms is the normal mode of ending the contention. And it is a treaty of peace which embodies such understanding.

Peace  
Negotia-  
tions.

§ 267. However, as the outbreak of war interrupts all regular non-hostile intercourse between the belligerents, negotiations of peace can often be initiated under difficulties only. Each party, although

willing to negotiate, may have strong reasons for not opening negotiations. Good offices and mediation on the part of neutrals have, therefore, always been of great importance, as thereby negotiations were called into existence which otherwise would have been long delayed. But it must be emphasised that formal as well as informal peace negotiations do in no wise *ipso facto* bring hostilities to a standstill, although a partial or general armistice may be concluded for the purpose of such negotiations. The fact that peace negotiations are going on directly between belligerents does not create any non-hostile relations between them other than those negotiations themselves. Such negotiations may take place through the exchange of letters between the belligerent Governments, or through special negotiators who may meet on neutral territory or on the territory of one of the belligerents. In case they meet on belligerent territory, the enemy negotiators are inviolable and must be treated on the same footing as bearers of flags of truce, if not as diplomatic envoys. For it may happen that a belligerent receives an enemy diplomatic envoy for the purpose of peace negotiations. Be that as it may, negotiations, wherever taking place and by whomever conducted, may always be broken off before an agreement is arrived at.

§ 268. Although they are ready to terminate the war through a treaty of peace, belligerents are frequently for some reason or another not able to settle all the terms of peace at once. In such cases hostilities are usually brought to an end through so-called preliminaries of peace, the definite treaty, which has to take the place of the preliminaries, to be concluded later on. Such preliminaries are a treaty in themselves, embodying an agreement of the parties regarding

Pre-  
liminaries  
of Peace.



such terms of peace as are essential. Preliminaries are as binding as any other treaty, and therefore they need ratification to be binding. Very often, but not necessarily, the definitive treaty of peace is concluded elsewhere. Thus, the war between Austria, France, and Sardinia was ended by the Preliminaries of Villafranca of July 11, 1859, yet the definitive treaty of peace was concluded at Zurich on November 10, 1859. The war between Austria and Prussia was ended by the Preliminaries of Nickolsburg of July 26, 1866, yet the definitive treaty of peace was concluded at Prague on August 23. In the Franco-German War the Preliminaries of Versailles of February 26, 1871, were the precursor of the definitive treaty of peace concluded at Frankfort on May 10, 1871.<sup>1</sup>

The purpose for which preliminaries of peace are agreed upon makes it obvious that such essential terms of peace as are stipulated by the Preliminaries are the basis of the definitive treaty of peace. It may happen, however, that neutral States protest for the purpose of preventing this. Thus, when the war between Russia and Turkey had been ended through the Preliminaries of San Stefano of March 3, 1878, Great Britain protested, a Congress met at Berlin, and Russia had to be content with less favourable terms of peace than those stipulated at San Stefano.

Form and  
Parts of  
Peace  
Treaties.

§ 269. International Law does not contain any rules regarding the form of peace treaties; they may, therefore, be concluded verbally or in writing. But the importance of the matter makes the parties always conclude a treaty of peace in writing, and

<sup>1</sup> No preliminaries of peace were agreed upon at the end of the Russo-Japanese war. After negotiations at Portsmouth (New Hampshire) led to a final under-  
standing on August 29, 1905, the treaty of peace was signed on September 5, and ratified on October 16.

there is no instance of a verbally concluded treaty of peace.

According to the different points stipulated, it is usual to distinguish different parts within a peace treaty. Besides the preamble, there are general, special, and separate articles. General articles are those which stipulate such points as are to be agreed upon in every treaty of peace, as the date of termination of hostilities, the release of prisoners of war, and the like. Special articles are those which stipulate the special terms of the agreement of peace in question. Separate articles are those which stipulate points with regard to the execution of the general and special articles, or which contain reservations and other special remarks of the parties. Sometimes *additional* articles occur. Such are stipulations agreed upon in a special treaty following the treaty of peace and comprising stipulations regarding such points as have not been mentioned in the treaty of peace.

§ 270. As the treaty-making Power is according to the Law of Nations in the hands of the head<sup>1</sup> of the State, it is he who possesses competence of concluding peace. But just as in constitutional restrictions imposed upon heads of States regarding their general power of concluding treaties,<sup>2</sup> so constitutional restrictions imposed upon heads of States regarding their competence of making peace are of importance for International Law. And, therefore, such treaties of peace concluded by heads of States as violate constitutional restrictions are not binding upon the States concerned, because the heads have exceeded their powers. The Constitutions of the different States settle the matter differently, and it is not at all necessary that the power of declaring war

Competence to conclude Peace.

<sup>1</sup> See above, vol. I. § 495. ;

<sup>2</sup> See above, vol. I. § 497.

and that of making peace are vested by a Constitution in the same hands. In Great Britain the power of the Crown to declare war and to make peace is indeed unrestricted. But in the German Empire, for instance, it is different; for whereas the Emperor, the case of an attack on German territory excepted, can declare war with the consent of the Bundesrath only, his power of making peace is unrestricted.<sup>1</sup>

The controverted question whether the head of a State who is a prisoner of war is competent to make peace ought to be answered in the negative. The reason is that the head of a constitutional State, although he does not by becoming prisoner of war lose his position, nevertheless thereby loses the power of exercising the rights connected with his position.<sup>2</sup>

Date of  
Peace.

§ 271. Unless the treaty provides otherwise, peace commences with the signature of the peace treaty. Should the latter not be ratified, hostilities may be recommenced, and the unratified peace treaty is considered as an armistice. Sometimes, however, the peace treaty fixes a future date for the commencement of peace, stipulating that hostilities must cease on a certain future day. This is the case when war is waged in different or distant parts of the world, so that it is impossible at once to inform the opposing forces of the conclusion of peace.<sup>3</sup> It may even occur that different dates are stipulated for the termination of hostilities in different parts of the world.

The question has arisen whether, in case a peace treaty provides a future date for the termination of hostilities in distant parts, and in case the forces in

<sup>1</sup> See more examples in Rivier, II. p. 445.

<sup>2</sup> See Vattel, IV. § 13.

<sup>3</sup> The ending of the Russo-Japanese war was quite peculiar. Although the treaty of peace was

signed on September 5, 1905, the agreement concerning an armistice pending ratification of the peace treaty was not signed until September 14, and hostilities went on till September 16.

these parts hear of the conclusion of peace before such date, they must abstain at once from further hostilities. Most publicists correctly answer this question in the affirmative. But the French Prize Courts in 1801 condemned the English vessel "Swineherd" as a good prize which was captured by the French privateer "Bellona" in the Indian Seas within the period of five months fixed by the Peace of Amiens for the termination of hostilities in these seas.<sup>1</sup>

## V

## EFFECTS OF TREATY OF PEACE

Grotius, III. c. 20—Vattel, IV. §§ 19-23—Hall, §§ 198-202—Lawrence, § 239—Phillimore, III. §§ 518-528—Halleck, I. pp. 312-324—Taylor, §§ 581-583—Wheaton, §§ 544-547—Bluntschli, §§ 708-723—Heffter, §§ 180-183, 184A—Kirchenheim in Holtzendorff, IV. pp. 804-817—Ullmann, § 171—Bonfils, Nos. 1698-1702—Despagnet, No. 605—Rivier, II. pp. 454-461—Calvo, V. §§ 3137-3163—Fiore, III. Nos. 1701-1703—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 330-336—Pillet, pp. 375-377.

§ 272. The chief and general effect of a peace treaty is restoration of the condition of peace between the former belligerents. As soon as the treaty is ratified, all rights and duties which exist in time of peace between the members of the family of nations are *ipso facto* and at once revived between the former belligerents.

Restora-  
tion of  
Condition  
of Peace.

On the one hand, all acts legitimate in warfare cease to be legitimate. Neither contributions and requisitions, nor attacks on members of the armed forces and on fortresses, nor capture of ships, nor

<sup>1</sup> The details of this case are given by Hall, § 199; see also Phillimore, III. § 521.

occupation of territory are any longer lawful. If forces, in ignorance of the conclusion of peace, commit such hostile acts, the condition of things at the time peace was concluded must as far as possible be restored.<sup>1</sup> Thus, ships captured must be set free, territory occupied must be evacuated, members of armed forces taken prisoners must be liberated, contributions imposed and paid must be repaid.

On the other hand, all peaceful intercourse of the former belligerents as well as of their subjects takes place again as before the war. Thus diplomatic intercourse is reinstated, consular officers recommence activity.<sup>2</sup>

It must be specially observed that the condition of peace created by a peace treaty is legally final in so far as the order of things set up and stipulated by the treaty of peace is now the settled basis of the future relations between the parties, however contentious the matters concerned may have been before the outbreak of war. In concluding peace the parties expressly or implicitly declare that regarding such settled matters they have come to an understanding. They may indeed make war against each other in future on other grounds, but they are legally bound not to go to war for such matters as have been settled by a previous treaty of peace. That the practice of States does sometimes not comply with this rule is a well-known fact which, although it discredits this rule, cannot shake its theoretical validity.

<sup>1</sup> The Mentor, 1 Rob. 175. Matters are, of course, different in case a future date—see above, § 271—is stipulated for the termination of hostilities.

<sup>2</sup> The assertion of many writers, that such contracts between subjects of belligerents as have been suspended by the outbreak of

war revive *ipso facto* by the conclusion of peace is not the outcome of a rule of International Law. But just as Municipal Law may suspend such contracts *ipso facto* by the outbreak of war, so it may revive them *ipso facto* by the conclusion of peace (see above, § 101).

§ 273. Unless the parties stipulate otherwise, the effect of a treaty of peace is that everything remains in such condition as it was at the time peace was concluded. Thus, all moveable State property, as munitions, provisions, arms, money, horses, means of transport, and the like, seized by an invading belligerent remain his property, as likewise do the fruits of immoveable property seized by him. Thus, further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who can annex it. But it is nowadays usual, although not at all legally necessary, for the conqueror desirous of retaining conquered territory to stipulate cession of such territory in the treaty of peace.

Principle  
of *Ut  
Possi-  
detis.*

§ 274. Since a treaty of peace is considered a final settlement of the war, one of the effects of every peace treaty is the so-called amnesty—that is, an immunity for all wrongful acts done by the belligerents themselves, the members of their forces, and their subjects during the war, and due to political motives. It is usual, but not at all necessary, to insert an amnesty clause in treaties of peace.<sup>1</sup> All so-called war crimes which have not been punished before the conclusion of peace can now no longer be punished. Individuals who have committed such war crimes and are arrested for them must be liberated.<sup>2</sup> International delinquen-

Amnesty.

<sup>1</sup> See above, §§ 251–257. Clause 4 of the “Terms of Surrender of the Boer Forces in the Field”—see Parliamentary Papers, South Africa, 1902, Cd. 1096—seems to contradict this assertion, as it expressly excludes from the amnesty “certain acts, contrary to usages of war, which have been notified by the Commander-in-Chief to the Boer Generals, and which shall be tried by court-martial

immediately after the close of hostilities. But it will be remembered—see above, p. 279, note 1—that the agreement embodying these terms of surrender does not bear the character of a treaty of peace, the Boer War having been terminated through subjugation.

<sup>2</sup> This applies to such individuals only as have not yet been convicted. Those who are undergoing a term of imprisonment

cies committed intentionally by belligerents through violation of the rules of legitimate warfare are considered condoned. Even claims for reparation of damages caused by such acts cannot be raised after the conclusion of peace, unless the contrary is expressly stipulated. On the other hand, the amnesty has nothing to do with ordinary crimes and with debts incurred during war. A prisoner of war who commits a murder during captivity may be tried and punished after conclusion of peace, just as a prisoner who runs into debt during captivity may be sued after the conclusion of peace, or an action may be brought on ransom bills after peace has been restored.

But it must be specially observed that the amnesty grants immunity only for wrongful acts done by the subjects of one belligerent against the other. Such wrongful acts as have been committed by the subjects of a belligerent against their own Government are not covered by the amnesty. Therefore treason, desertion, and the like committed during the war by his own subjects may be punished by a belligerent after the conclusion of peace, unless the contrary has been expressly stipulated in the treaty of peace.<sup>1</sup>

Release of  
Prisoners  
of War.

§ 275. A very important effect of a treaty of peace is termination of the captivity of prisoners of war.<sup>2</sup> This does, however, not mean that with the conclusion of peace all prisoners of war must at once be released from their place of detention. It only means—to use the words of article 20 of the Hague Regulations—that “After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as need not be liberated at the conclusion of peace; see above, § 257.

<sup>1</sup> Thus Russia stipulated by article 17 of the Preliminaries of San Stefano, in 1878—see Martens, N.R.G., 2nd ser. III. p. 252

—that Turkey must accord an amnesty to such of her subjects as had compromised themselves during the war.

<sup>2</sup> See above, § 132.

possible." The instant release of prisoners on the spot would not only be inconvenient for the State which kept them in captivity, but also for themselves, as in most cases they possess no means to pay for their journey home. Therefore, although they cease with the conclusion of peace to be in captivity, prisoners of war remain as a body under military discipline until they are brought to the frontier and handed over to their Government. That prisoners of war may be retained after conclusion of peace until they have paid debts incurred during captivity seems to be a pretty generally<sup>1</sup> recognised rule. But it is controverted whether such prisoners of war may be retained as are undergoing a term of imprisonment imposed upon them for disciplinary offences. After the Franco-German War in 1871 Germany retained such prisoners,<sup>2</sup> whereas Japan after the Russo-Japanese War in 1905 released them.

§ 276. The question how far a peace treaty has the effect of reviving treaties concluded between the parties before the outbreak of war is much controverted. The answer depends upon the decision of the other question, how far the outbreak of war cancels existing treaties between belligerents.<sup>3</sup> There can be no doubt that all such treaties as have been cancelled by the outbreak of war do not revive. On the other hand, there can likewise be no doubt that such treaties revive as have only become suspended by the outbreak of war. But no certainty or unanimity exists regarding such treaties as do not belong to the above two classes, and it must, therefore, be emphasised that no rule of International Law exists concerning

Revival of  
Treaties.

<sup>1</sup> See, however, Pradier-Fodéré, VII. No. 2839, who objects to it.

<sup>2</sup> See Pradier-Fodéré, VII. No. 2840.

<sup>3</sup> See the very detailed discussion of the question in Phillimore, III. §§ 529-538; see also above, § 99.



these treaties. It is for the parties to make special stipulations in the peace treaty which settle the matter.

## VI

### PERFORMANCE OF TREATY OF PEACE

Grotius, III. c. 20—Vattel, IV. §§ 24-34—Phillimore, III. § 597—Halleck, I. pp. 322-324—Taylor, §§ 593-594—Wheaton, §§ 548-550—Bluntschli, §§ 724-726—Heffter, § 184—Kirchenheim in Holtzendorff, IV. pp. 817-822—Ullmann, § 171—Bonfils, Nos. 1706-1709—Despagnet, Nos. 610, 611—Rivier, II. pp. 459-461—Calvo, V. §§ 3164-3168—Fiore, III. Nos. 1704-1705—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 336-337.

Treaty of  
Peace  
how to be  
carried  
out.

§ 277. The general rule, that treaties must be performed in good faith, applies to peace treaties as well as to others. The great importance, however, of a treaty of peace and its particular circumstances and conditions involves the necessity of drawing attention to some points connected with the performance of treaties of peace. Occupied territory may have to be evacuated, a war indemnity to be paid in cash, boundary lines of ceded territory may have to be drawn, and many other tasks to be performed. These tasks often necessitate the conclusion of numerous treaties for the purpose of performing the peace treaty concerned, and the appointment of commissioners who meet in conferences to inquire into details and prepare a compromise. Difficulties may arise in regard to the interpretation<sup>1</sup> of certain stipulations of the peace treaty which arbitration will settle if the parties cannot agree. Arrangements will have to be made for the case in which a part or the whole of the territory occupied during the war remains

<sup>1</sup> See above, vol. I. §§ 553-554.

according to the peace treaty for some period under military occupation, such occupation to serve as a means of securing the performance of the peace treaty.<sup>1</sup> One can form an idea of the numerous points of importance to be dealt with during the performance of a treaty of peace if one takes the fact into consideration that after the Franco-German War was terminated in 1871 by the Peace of Frankfort, more than a hundred Conventions were successively concluded between the parties for the purpose of carrying out this treaty of peace.

§ 278. Just as the performance, so the breach of peace treaties is of great importance. A peace treaty may be violated in its whole extent or in one of its stipulations only. Violation by one of the parties does not *ipso facto* cancel the treaty, but the other party can cancel it on the ground of violation. Just as in violation of treaties in general, so in violations of treaties of peace, some publicists maintain that a distinction must be drawn between essential and non-essential stipulations, and that violation of essential stipulations only creates a right of cancelling the treaty of peace. It has been shown above, vol. I. § 547, that the majority of publicists rightly oppose such distinction.

Breach of  
Treaty of  
Peace.

But a distinction must be made between violation during the period in which the conditions of the peace treaty have to be fulfilled and violation after such period. In the first case, the other party can at once recommence hostilities, the war being considered not to have terminated at all through the violated peace treaty. The second case, which might happen soon or several years after the period for the fulfilment of the peace conditions, is in no way

<sup>1</sup> See above, vol. I. § 527.

different from violation of any treaty in general. And if a party cancels the peace treaty and wages war for its violation against the offender, this war is a new war, and in no way a continuation of the previous war terminated by the now violated treaty of peace. It must, however, be specially observed that, just as in case of violation of a treaty in general, so in case of violation of a peace treaty, the offended party who wants to cancel the treaty on the ground of its violation must do this in due time after the violation has taken place, otherwise the treaty remains valid, or at least the non-violated parts of it. A mere protest does neither constitute a cancellation nor reserve the right of cancellation.<sup>1</sup>

## VII

### POSTLIMINIUM

Grotius, III. c. 9—Bynkershoek, Quæst. jur. publ. I. c. 15 and 16—Vattel, III. §§ 204-222—Hall, § 162-166—Manning, pp. 190-195—Phillimore, III. §§ 568-590—Halleck, II. pp. 500-526—Taylor, § 595—Wheaton, § 398—Bluntschli, §§ 727-741—Heffter, §§ 188-192—Kirchenheim in Holtzendorff, IV. pp. 822-836—Ullmann, § 169—Bonfilis, No. 1710—Despagnet, No. 612—Rivier, II. pp. 314-316—Calvo, V. §§ 3169-3226—Fiore, III. Nos. 1706-1712—Martens, II. § 128—Pillet, p. 377.

Concep-  
tion of  
Post-  
liminium.

§ 279. The term "postliminium" is originally one of Roman Law derived from *post* and *limes* (i.e. boundary). According to Roman Law the relations of Rome with a foreign State depended upon the fact whether or not a treaty of friendship<sup>2</sup> existed. If such a treaty was not in existence, Roman individuals coming into the foreign State concerned could be enslaved, and Roman goods coming there

<sup>1</sup> See above, vol. I. § 547.

<sup>2</sup> See above, vol. I. § 40.

could be appropriated. Now, *jus postliminii* denoted the rule, first, that such an enslaved Roman, should he ever return into the territory of the Roman Empire, became *ipso facto* a Roman citizen again with all the rights he possessed previous to his capture, and, second, that Roman property, appropriated after entry into the territory of a foreign State, should at once revert to its former Roman owner *ipso facto* by coming back into the territory of the Roman Empire. Modern International and Municipal Law have adopted the term for the purpose of indicating the fact that territory, individuals, and property, after having come in time of war under the sway of the enemy, return either during the war or with the end of the war under the sway of their original Sovereign. This can occur in different ways. A territory occupied can voluntarily be evacuated by the enemy and then at once be re-occupied by the owner. Or it can be re-conquered by the legitimate Sovereign. Or it can be reconquered by a third party and restored to its legitimate owner. Conquered territory can also be freed through a successful levy *en masse*. Property seized by the enemy may be retaken, but it may also be abandoned by the enemy and subsequently revert to the belligerent from whom it was taken. And, further, conquered territory may in consequence of a treaty of peace be restored to its legitimate Sovereign. In all cases concerned, the question has to be answered what legal effects the postliminium has in regard to the territory, the individuals thereon, or the property concerned.

§ 280. Most writers confound the effects of postliminium according to Municipal Law with those according to International Law. For instance:

Postliminium according to International

Law, in  
contra-  
distinction  
to Post-  
liminium  
according  
to Muni-  
cipal Law.

whether a recaptured private ship falls *ipso facto* back into the property of its former owner,<sup>1</sup> whether the former laws of a reconquered State revive *ipso facto* by the reconquest, whether sentences passed on criminals during the time of an occupation by the enemy should be annulled—these and most of the other questions treated in books on International Law have nothing to do with International Law at all, but have to be answered by the Municipal Law of the respective States exclusively. International Law can be concerned only with such effects of postliminium as are international. These international effects of postliminium may be grouped under the following heads: revival of the former condition of things, validity of legitimate acts, invalidity of illegitimate acts.

Revival  
of the  
Former  
Condition  
of Things.

§ 281. Although a territory and the individuals thereon come through military occupation in war under the actual sway of the enemy, neither such territory nor such individuals fall, according to the rules of International Law of our times, under the sovereignty of the invader. They rather remain, if not acquired by the conqueror through subjugation, under the sovereignty of the other belligerent, although the latter is in fact prevented from exercising his supremacy over them. Now, the moment the invader voluntarily evacuates such territory, or is driven away through a levy *en masse*, or by troops of the other belligerent or of his ally, the former condition of things *ipso facto* revives, the territory and individuals concerned being at once, as far as International Law is concerned, considered to be again under the sway of their legitimate Sovereign. For all events of international importance taking

<sup>1</sup> See above, § 196.

place on such territory the legitimate Sovereign is again responsible towards third States, whereas during the time of occupation the occupant was responsible for such events.

But it must be specially observed that the case in which the occupant of a territory is driven out of it by the forces of a third State not allied with the legitimate Sovereign of such territory is not a case of postliminium, and that consequently the former state of things does not revive, unless the new occupant hands the territory over to the legitimate Sovereign. If this is not done, the military occupation of the new occupant takes the place of that of the previous occupant.

§ 282. Postliminium has no effect upon such acts of the former military occupant connected with the occupied territory and the individuals and property thereon as were legitimate acts of warfare. On the contrary, the State into whose possession such territory has returned must recognise all such legitimate acts of the former occupant, and the latter has by International Law a right to demand such recognition. Therefore, if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immoveable property, has disposed of such moveable State property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this cannot be ignored by the legitimate Sovereign after he has again taken possession of the territory.

Validity  
of Legiti-  
mate Acts.

However, only those consequences of such acts must be recognised which have occurred during the occupation. A case which illustrates this happened after the Franco-German War. In October 1870, during occupation of the *Départements de la Meuse*

and *de la Meurthe* by the German troops, a Berlin firm entered into contract with the German Government for felling 15,000 oak trees from the State forests of these *départements*, paying in advance 2,250*l.* The Berlin firm sold the contract rights to others, who felled 9,000 trees and sold in March 1871 their right to fell the remaining 6,000 trees to a third party. The latter felled a part of these trees during the German occupation, but, when the French Government again took possession of the territory concerned, the contractors were without indemnity prevented from further felling of trees.<sup>1</sup> The question whether the Germans had a right at all to enter into the contract is doubtful. But even if they had such right, it covered the felling of trees during their occupation only, and not afterwards.

Invalidity  
of Illegitimate  
Acts.

§ 283. If the occupant has performed acts which are not legitimate acts of warfare, postliminium makes their invalidity apparent. Therefore, if the occupant has sold immoveable State property, such property may afterwards be claimed from the acquirer, whoever he is, without any indemnity. If he has given office to individuals, the latter may afterwards be dismissed. If he has appropriated and sold such private or public property as cannot legitimately be appropriated by a military occupant, it may afterwards be claimed from the acquirer without payment of damages.

No Postliminium  
after  
Interregnum.

§ 284. Cases of postliminium occur only when a conquered territory comes either during or at the end of the war again into the possession of the legitimate

<sup>1</sup> The Protocol of Signature added to the Additional Convention to the Peace Treaty of Frankfurt, signed on December 11, 1871—see Martens, N.R.G., XX. p. 868

—comprises a declaration stating the fact that the French Government does not recognise any liability to pay indemnities to the contractors concerned.

Sovereign. No case of postliminium arises when a territory ceded to the enemy by the treaty of peace or conquered and annexed without cession at the end of a war terminated through simple cessation of hostilities<sup>1</sup> later on returns into the possession of its former owner State, or when the whole of the territory of a State which was conquered and subjugated regains its liberty and becomes again the territory of an independent State. Such territory has actually been under the sovereignty of the conqueror; the period between the conquest and the revival of the previous condition of things was not one of mere military occupation during war, but one of interregnum during time of peace, and therefore the revival of the former condition of things is not a case of postliminium. An illustrative instance of this is furnished by the case of the domains of the Electorate of Hesse-Cassel.<sup>2</sup> This hitherto independent State was subjugated in 1806 by Napoleon and became in 1807 part of the Kingdom of Westphalia constituted by Napoleon for his brother Jerome, who governed it up to the end of 1813, when with the downfall of Napoleon the Kingdom of Westphalia fell to pieces and the former Elector of Hesse-Cassel was reinstated. Jerome had during his reign sold many of the domains of Hesse-Cassel. The returned Elector, however, did not recognise these contracts, but deprived the owners of their property without indemnification, maintaining that a case of postliminium had arisen, and that Jerome had no right to sell the domains. The Courts of the Electorate pronounced against the Elector, denying that a case of postliminium had arisen, since Jerome, although

<sup>1</sup> See above, § 263.

574, and the literature there

<sup>2</sup> See Phillimore, III. §§ 568- quoted.



a usurper, had been King of Westphalia during an interregnum, and since the sale of the domains was therefore no wrongful act. But the Elector, who was absolute in the Electorate, did not comply with the verdict of his own courts, and the Vienna Congress, which was approached in the matter by the unfortunate proprietors of the domains, refused its intervention, although Prussia strongly took their part. It is generally recognised by all writers on International Law that this case was not one of postliminium, and the attitude of the Elector cannot be defended by recourse to International Law.

**PART III**  
**NEUTRALITY**



## CHAPTER I

### ON NEUTRALITY IN GENERAL

#### I

#### DEVELOPMENT OF THE INSTITUTION OF NEUTRALITY

Hall, §§ 208-214—Lawrence, § 244—Phillimore, III. §§ 161-226—Twiss, II. §§ 208-212—Taylor, §§ 596-613—Walker, History, pp. 195-203, and Science, pp. 374-385—Geffcken in Holtzendorff, IV. pp. 614-634—Ullmann, § 192—Bonfils, Nos. 1494-1521—Rivier, II. pp. 370-375—Calvo, IV. §§ 2494-2591—Fiore, III. Nos. 1503-1535—Martens, II. § 130—Dupuis, Nos. 302-307—Mérignhac, pp. 339-342—Boeck, Nos. 8-153—Kleen, I. pp. 1-70—Cauchy, "Le droit maritime international" (1862), vol. II. pp. 325-430—Gessner, pp. 1-69—Bergbohm, "Die bewaffnete Neutralität 1780-1783" (1884)—Fauchille, "La diplomatie française et la ligue des neutres 1780" (1893)—Schweizer, "Geschichte der schweizerischen Neutralität" (1895), I. pp. 10-72.

§ 285. Since in antiquity there was no notion of an International Law,<sup>1</sup> it is not to be expected that neutrality as a legal institution should have existed among the nations of old. But neutrality did not exist even in practice, for belligerents never recognised an attitude of impartiality on the part of other States. If war broke out between two nations, third parties had to choose between the belligerents and become ally or enemy of one or other. This does not mean that third parties had actually to take part in the fighting. Nothing of the kind was the case. But they had, if necessary, to render assistance; for

Neutrality  
not prac-  
tised in  
Ancient  
Times.

<sup>1</sup> See above, Vol. I. § 37.

example, to allow the passage of belligerent forces through their country, to supply provisions and the like, on the one hand, and, on the other, to deny all such assistance to the enemy. Several instances are known of efforts<sup>1</sup> on the part of third parties to take up an attitude of impartiality, but belligerents never recognised such impartiality.

Neutrality  
during the  
Middle  
Ages.

§ 286. During the Middle Ages matters changed in so far only as in the latter part of this period belligerents did not exactly force third parties to a choice, but legal duties and rights connected with neutrality did not exist. A State could maintain that it was no party to a war, although it furnished one of the belligerents with money, troops, and other kinds of assistance. To avoid such assistance, which was in no way considered illegal, treaties were frequently concluded during the latter part of the Middle Ages for the purpose of specially stipulating that the parties should be obliged not to assist in any way each other's enemies during time of war, and to prevent their subjects from doing the same. It is through the influence of such treaties that the difference during war between a real and feigned impartial attitude of third States grew up, and that neutrality, as an institution of International Law, gradually developed during the sixteenth century.

Of great importance was the fact that the Swiss Confederation, in contradistinction to her policy during former times, made it from the end of the sixteenth century a matter of policy always to remain neutral during wars of other States. Although this former Swiss neutrality can in no way be compared with modern neutrality, since Swiss mercenaries were for centuries to come fighting in all

<sup>1</sup> See Geffcken in Holtzendorff, IV. pp. 614-615.

European wars, the Swiss Government itself succeeded in constantly taking up and preserving such an attitude of impartiality as complied with the current rules of neutrality.

It should be mentioned that the collection of rules and customs regarding Maritime Law which goes under the name of *Consolato del Mare* made its appearance at about the middle of the fourteenth century. The rule there laid down, that in time of war enemy goods on neutral vessels may be seized, but that, on the other hand, neutral goods on enemy vessels must be restored, became of great importance, since Great Britain acted accordingly from the beginning of the eighteenth century until the outbreak of the Crimean War in 1854.<sup>1</sup>

§ 287. At the time of Grotius, neutrality was recognised as an institution of International Law, although such institution was in its infancy only and wanted a long time to reach its present range. Grotius did not know, or at least did not make use of, the term neutrality. He treats neutrality in the very small seventeenth chapter of the Third Book on the Law of War and Peace under the head *De his, qui in bello medii sunt*, and establishes in § 3 two doubtful rules only. The first is that neutrals shall do nothing which may strengthen such belligerent whose cause is unjust, or which may hinder the movements of such belligerent whose cause is just. The second rule is that in a war in which it is doubtful whose cause is just neutrals shall treat both belligerents alike in permitting the passage of troops as well as in supplying provisions for the troops, and in not rendering assistance to persons besieged.

Neutrality  
during the  
Seven-  
teenth  
Century.

The treatment of neutrality by Grotius shows, on

<sup>1</sup> See above, § 176.

the one hand, that apart from the recognition of the fact that third parties could remain neutral, not many rules regarding the duties of neutrals existed, and, on the other hand, that the granting of passage to troops of belligerents and the supply of provisions to them was not considered illegal. And the practice of the seventeenth century furnishes numerous instances of the fact that neutrality did not really mean an attitude of impartiality, and that belligerents did not respect the territories of neutral States. Thus, although Charles I. remained neutral, the Marquis of Hamilton and six thousand British soldiers were fighting in 1631 under Gustavus Adolphus. "In 1626 the English captured a French ship in Dutch waters. In 1631 the Spaniards attacked the Dutch in a Danish port; in 1639 the Dutch were in turn the aggressors, and attacked the Spanish Fleet in English waters; again, in 1666 they captured English vessels in the Elbe . . . ; in 1665 an English fleet endeavoured to seize the Dutch East India Squadron in the harbour of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river."<sup>1</sup>

Progress  
of Neu-  
trality  
during  
the Eigh-  
teenth  
Century.

§ 288. It was not until the eighteenth century that theory and practice agreed upon the duty of neutrals to remain impartial, and the duty of belligerents to respect the territories of neutrals. Bynkershoek and Vattel formulate adequate conceptions of neutrality. Bynkershoek<sup>2</sup> does not use the term "neutrality," but calls neutrals *non hostes*, and he describes them as those who are of neither party—*qui neutrarum partium sunt*—in a war, and who do

<sup>1</sup> See Hall, § 209, p. 604.

<sup>2</sup> Quaest. jur. publ. I. c. 9.

not, according to a treaty, give assistance to either party. Vattel (III. § 103), on the other hand, makes use of the term "neutrality," and gives the following definition:—"Neutral nations, during a war, are those who take no one's part, remaining friends common to both parties, and not favouring the armies of one of them to the prejudice of the other." But although Vattel's book appeared in 1758, twenty-one years after that of Bynkershoek, his doctrines are in some ways less advanced than those of Bynkershoek. The latter, in contradistinction to Grotius, maintained that neutrals have nothing to do with the question which party to a war had a just cause, that neutrals, being friends to both parties, have not to sit as judges between these parties, and, consequently, must not give or deny to one or other party more or less in accordance with their conviction as to the justice or injustice of the cause of each. Vattel, however, teaches (III. § 135) that a neutral, although he may generally allow the passage of troops of the belligerents through his territory, can refuse this passage to such belligerent as is making war for an unjust cause.

Although the theory and practice of the eighteenth century agreed upon the duty of neutrals to remain impartial, the impartiality demanded was not at all a strict one. For, first, throughout the greatest part of the century a State was considered not to violate neutrality in case it furnished one of the belligerents with such limited assistance as it had previously promised by treaty.<sup>1</sup> In this way troops could be supplied to a belligerent by a neutral, and passage through neutral territory could be granted to his forces. And, secondly, the possibility existed for

<sup>1</sup> See examples in Hall, § 211.



either belligerent to make use of the resources of neutrals. It was not considered a breach of neutrality on the part of a State to allow one or both belligerents levies of troops on its territory, or the granting of Letters of Marque to vessels belonging to its commercial fleet. During the second half of the eighteenth century, theory and practice became indeed aware of the fact that neutrality was not consistent with all these and other indulgences. But this only led to the distinction between neutrality in the strict sense of the term and an imperfect neutrality.

As regards respect of neutral territory on the part of belligerents, progress was also made in the eighteenth century. Whenever neutral territory was violated, reparation was asked and made. But it was considered lawful for the victor to pursue the vanquished army into neutral territory, and, likewise, for a fleet to pursue the beaten enemy fleet into neutral territorial waters.

First  
Armed  
Neu-  
trality.

§ 289. Whereas, on the whole, the duty of neutrals to remain impartial and the duty of belligerents to respect neutral territory became generally recognised during the eighteenth century, the members of the Family of Nations did not come during this period to an agreement regarding the treatment of neutral vessels trading with belligerents. It is true that the right of visit and search for contraband of war and the right to seize the latter was generally recognised, but in all other respects no general theory and practice was agreed upon. France and Spain upheld the rule that neutral goods on enemy ships as well as neutral ships carrying enemy goods could be seized by belligerents. Although England granted from time to time, by special treaties with special States, the rule "Free ship, free goods," her general

practice throughout the eighteenth century followed the rule of the *Consolato del Mare*, according to which enemy goods on neutral vessels can be seized, whereas neutral goods on enemy vessels must be restored. England, further, upheld the principle that the commerce of neutrals should in time of war be restricted within the same limits as in time of peace, since most States reserved in time of peace cabotage and trade with their colonies to vessels of their own merchant marine. It was in 1756 that this principle first came into dispute. In this year, during war with England, France found that on account of the naval superiority of England she was unable to carry on her colonial trade by her own merchant marine, and she threw, therefore, this trade open to vessels of the Netherlands, which had remained neutral. England, however, ordered her fleet to seize all such vessels with their cargoes on the ground that they had become incorporated into the French merchant marine, and had thereby acquired enemy character. From this time the above principle is commonly called the "rule<sup>1</sup> of 1756." England, thirdly, followed other Powers in the practice of declaring enemy coasts to be blockaded and condemning captured neutral vessels for breach of blockade, although the blockades were not at all always effective.

As privateering was legitimate and in general use, neutral commerce was considerably disturbed during every war between naval States. Now in 1780, during war between Great Britain, her American Colonies, France, and Spain, Russia sent a circular<sup>2</sup> to England, France, and Spain, in which she

<sup>1</sup> See Phillimore, III. §§ 212- Nos. 131-133.  
222; Hall, § 234; Manning, pp. <sup>2</sup> Martens, R., III. p. 158.  
260-267; Boeck, No. 52; Dupuis,

proclaimed the following five principles: (1) That neutral vessels should be allowed to navigate from port to port of belligerents and along their coasts; (2) that enemy goods on neutral vessels, contraband excepted, should not be seized by belligerents; (3) that, with regard to contraband, articles 10 and 11 of the treaty of 1766 between Russia and Great Britain should be applied in all cases; (4) that a port should only be considered blockaded if the blockading belligerent had stationed vessels there, so as to create an obvious danger for neutral vessels entering the port; (5) that these principles should be applied in the proceedings and judgments on the legality of prizes. In July and August 1780, Russia<sup>1</sup> entered into a treaty, first with Denmark and then with Sweden, for the purpose of enforcing those principles by equipping a number of men-of-war. Thus the "Armed Neutrality" made its appearance. In 1781, the Netherlands, Prussia, and Austria, in 1782 Portugal, and in 1783 the Two Sicilies joined the league. France, Spain, and the United States of America accepted the principles of the league without formally joining. The war between England, the United States, France, and Spain was terminated in 1783, and the war between England and the Netherlands in 1784, but in the treaties of peace the principles of the "Armed Neutrality" were not mentioned. This league had no direct practical consequences, since England retained her former standpoint. Moreover, some of the States that had joined the league acted against its principles when they themselves went to war—as did Sweden in 1788 during war with Russia, and France and Russia in 1793—and some of them concluded treaties in which

<sup>1</sup> Martens, R., III. pp. 189 and 198.

were contained stipulations at variance with those principles. Nevertheless, the First Armed Neutrality has proved of great importance, because its principles have furnished the basis of the Declaration of Paris of 1856.

§ 290. The wars of the French Revolution showed that the time was not yet ripe for the progress aimed at by the First Armed Neutrality. Russia, the very same Power which had initiated the Armed Neutrality in 1780 under the Empress Catharine II. (1762-1796), joined with Great Britain in 1793 to interdict all neutral navigation into ports of France, with the intention of subduing France by famine. Russia and England justified their attitude by the exceptional character of their war against France, which had proved the enemy of the security of all other nations. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to enemy ports or carrying enemy goods.

The French Revolution and the Second Armed Neutrality.

But although Russia herself had acted in defiance of the principles of the First Armed Neutrality, she called a second into existence in 1800, during the reign of the Emperor Paul. The Second Armed Neutrality was caused by the refusal of England to concede immunity from visit and search to neutral merchantmen under convoy.<sup>1</sup> Sweden was the first to claim in 1653, during war between Holland and Great Britain, that the belligerents should not visit and search Swedish merchantmen under convoy of Swedish men-of-war, provided a declaration was made by the men-of-war that the merchantmen had no contraband on board. Other States by-and-by raised the same claim, and many treaties were

<sup>1</sup> See below, § 417.

concluded which stipulated immunity from visit and search of neutral merchantmen under convoy. But Great Britain refused to recognise the principle, and when, in July 1800, a British squadron captured a Danish man-of-war and her convoy of several merchantmen for having resisted visit and search, Russia invited Sweden, Denmark, and Prussia to renew the "Armed Neutrality," and to add to its principles the further one, that belligerents should not have a right of visit and search in case the commanding officer of the man-of-war, under whose convoy neutral merchantmen are sailing, should declare that the convoyed vessels do not carry contraband of war. In December 1800 Russia concluded treaties with Sweden, Denmark, and Prussia consecutively, by which the "Second Armed Neutrality" became a fact.<sup>1</sup> But it lasted only a year through the assassination of the Emperor Paul of Russia on March 23, and the defeat of the Danish fleet by Nelson on April 2, 1801, in the battle of Copenhagen. Nevertheless, the Second Armed Neutrality proved likewise of importance, for it led to a compromise in the "Maritime Convention" concluded by England and Russia under the Emperor Alexander I. on June 17, 1801, at St. Petersburg.<sup>2</sup> By article 3 of this treaty, England recognised, as far as Russia is concerned, the rules that neutral vessels may navigate from port to port and on the coasts of belligerents, and that blockades must be effective. But in the same article 3 England enforced recognition by Russia of the rule that enemy goods on neutral vessels may be seized, and she did not recognise the immunity of neutral vessels under convoy from visit

<sup>1</sup> Martens, R., VII. pp. 127-171. IV. pp. 218-302.  
See also Martens, *Causes Célèbres*, <sup>2</sup> Martens, R., VII. p. 260.

and search, although, by article 4, she conceded that the right of visit and search should be exercised only by men-of-war, and not by privateers, in case the neutral vessels concerned sail under convoy.

But this compromise did not last long. When in November 1807 war broke out between Russia and England, the former annulled in her declaration of war<sup>1</sup> the Maritime Convention of 1801, proclaimed again the principles of the First Armed Neutrality, and asserted that she would never drop these principles again. Great Britain proclaimed in her counter-declaration<sup>2</sup> her return to those principles against which the First and the Second Armed Neutrality were directed, and she was able to point out that no other Power had applied these principles more severely than Russia under the Empress Catharine II. after the latter had initiated the First Armed Neutrality.

Thus all progress made by the Maritime Convention of 1801 fell to the ground. Times were not favourable to any progress. After Napoleon's Berlin decrees in 1806 ordering the boycott of all English goods, England declared all French ports and all the ports of the allies of France blockaded, and ordered her fleet to capture all ships destined to these ports. And Russia, which had in her declaration of war against England in 1807 solemnly asserted that she would never again drop the principles of the First Armed Neutrality, by article 2 of the Ukase<sup>3</sup> published on August 1, 1809, violated one of the most important of these principles in ordering that neutral vessels carrying enemy (English) goods were to be stopped and the enemy goods seized, and the

<sup>1</sup> Martens, R., VIII. p. 706.

<sup>2</sup> Martens, R., VIII. p. 710.

<sup>3</sup> Martens, N.R., I. p. 484.

vessels themselves seized if more than the half of their cargoes consisted of enemy goods.

Neutrality  
during the  
Nine-  
teenth  
Century.

§ 291. The development of the rules of neutrality during the nineteenth century is caused by four factors.

(1) The most prominent and influential factor is the attitude of the United States of America towards neutrality from 1793 to 1818. When in 1793 England joined the war which had broken out in 1792 between the so-called First Coalition and France, Genêt, the French diplomatic envoy accredited to the United States, granted Letters of Marque to American merchantmen manned by American citizens in American ports. These privateers were destined to cruise against English vessels, and French Prize Courts were set up by the French Minister in connection with French consulates in American ports. On the complaint of Great Britain, the Government of the United States ordered these privateers to be disarmed and the French Prize Courts to be disorganised.<sup>1</sup> As the trial of Gideon Henfield,<sup>2</sup> who was acquitted, proved that the Municipal Law of the United States did not prohibit the enlistment of American citizens in the service of a foreign belligerent, Congress in 1794 passed an Act forbidding temporarily American citizens to accept Letters of Marque from a foreign belligerent and to enlist in the army or navy of a foreign State, and forbidding the fitting out and arming of vessels intended as privateers for foreign belligerents. Other Acts were passed from time to time. Finally, on April 20, 1818, Congress passed the Foreign Enlistment Act, which deals definitely with the

<sup>1</sup> See Wharton, III. §§ 395-396.

<sup>2</sup> Concerning this trial, see Taylor, § 609.

matter, and is still in force,<sup>1</sup> and afforded the basis of the British Foreign Enlistment Act of 1819. The example of the United States initiated the present practice, according to which it is the duty of neutrals to prevent the fitting out and arming on their territory of cruisers for belligerents, to prevent enlistment on their territory for belligerents, and the like.

(2) Of great importance for the development of neutrality during the nineteenth century became the permanent neutralisation of Switzerland and Belgium. These States naturally adopted and retained throughout every war an exemplary attitude of impartiality towards either belligerent. And each time when war broke out in their vicinity they took effectual military measures for the purpose of preventing belligerents from making use of their neutral territory and resources.

(3) The third factor is the Declaration of Paris of 1856, which incorporated into International Law the rule "Free ship, free goods," the rule that neutral goods on enemy ships cannot be appropriated, and the rule that blockade must be effective.

(4) The fourth and last factor is the general development of the military and naval resources of all members of the Family of Nations. As every big State was, during the second half of the nineteenth century, always obliged to keep its army and navy at every moment ready for war, in consequence, whenever war broke out, each belligerent was always anxious not to hurt neutral States in order to avoid their taking the part of the enemy. On the other hand, neutral States were always anxious to fulfil the

<sup>1</sup> See Wheaton, §§ 434-437; Taylor, § 610; Lawrence, § 244.



duties of neutrality for fear of being dragged into the war. Thus the general rule, that the development of International Law has been fostered by the interests of the members of the Family of Nations, applies also to the special case of neutrality. But for the interest of belligerents to remain during the war on good terms with neutrals, and but for the interest of the neutrals not to be dragged into the war, the institution of neutrality would never have developed so favourably as it actually has done during the nineteenth century.

Neutrality  
in the  
Twentieth  
Century.

§ 292. After only five years of the twentieth century have elapsed, it is difficult to say what factors will influence the development of International Law concerning neutrality during this century, and what direction this development will take. But there is no doubt that the Russo-Japanese War has produced several incidents which show that an agreement of the Powers concerning many points of neutrality is absolutely necessary. And it is to be hoped that the "wish" of the Final Act of the Hague Peace Conference—it is only one of the six there expressed—"that the question of the rights and duties of neutrals may be inserted in the programme of a Conference in the near future" will soon be fulfilled. The questions for discussion and settlement at such a Conference are enumerated and arranged by Professor Holland in the following list:<sup>1</sup>

(1) Are subsidised liners within the prohibition of the sale to a belligerent by a neutral Government of ships of war?

(2) Is a neutral Government bound to interfere

<sup>1</sup> See Holland, *Neutral Duties in the Proceedings of the British Academy*, vol. II. a Maritime War, as illustrated by recent events (1905), p. 15. From

with the use of its territory for the maintenance of belligerent communications by wireless telegraphy?

(3) To prevent the exit of even partially equipped war-ships?

(4) To prevent, with more care than has hitherto been customary, the exportation of supplies, especially of coal, to belligerent fleets at sea?

(5) By what specific precautions must a neutral prevent abuse of the "asylum" afforded by its ports to belligerent ships of war?—with especial reference to the bringing in of prizes, duration of stay, consequences of over-prolonged stay, the simultaneous presence of vessels of mutually hostile nationalities, repairs and approvisionnement during stay, and, in particular, renewal of stocks of coal.

(6) Interruption of safe navigation over territorial waters and the High Seas respectively?

(7) The distance from the scene of operations at which the right of visit may be properly exercised?

(8) The protection from the exercise of this right afforded by the presence of neutral convoy?

(9) The time and place at which so-called "volunteer" fleets and subsidised liners may exchange the mercantile for a naval character?

(10) Immunity for mail ships, or their mail bags?

(11) The requirement of actual warning to blockade-runners, and the application to blockade of the doctrine of "Continuous Voyages"?

(12) The distinction between "absolute" and "conditional" contraband, with especial reference to food and coal?

(13) The doctrine of "Continuous Voyages" with reference to contraband?

(14) The cases, if any, in which a neutral prize

may lawfully be sunk at sea, instead of being brought in for adjudication?

(15) The due constitution of Prize Courts?

(16) The legitimacy of a rule condemning the ship herself, when more than a certain proportion of her cargo is of a contraband character?

## II

### CHARACTERISTICS OF NEUTRALITY

Grotius, III. c. 17, § 3—Bynkershoek, Quaest. jur. publ. I. c. 9—Vattel, III. §§ 103-104—Hall, §§ 19-20—Lawrence, § 243—Phillimore, III. §§ 136-137—Halleck, II. p. 141—Taylor, § 614—Walker, § 54—Wheaton, § 412—Bluntschli, §§ 742-744—Heffter, § 144—Geffcken in Holtzendorff, IV. pp. 605-606—Gareis, § 87—Liszt, § 42—Ullmann, § 162—Bonfils, Nos. 1441 and 1443—Despagnet, No. 675—Rivier, II. pp. 368-370—Calvo, IV. §§ 2491-2493—Fiore, III. Nos. 1536-1541—Martens, II. § 129—Dupuis, No. 316—Mérignhac, pp. 349-351—Pillet, pp. 272-274—Heilborn, System, pp. 336-351—Perels, § 38—Testa, pp. 167-172—Kleen, I. §§ 1-4—Hautefeuille, I. pp. 195-200—Gessner, pp. 22-23—Schopfer, "Le principe juridique de la neutralité et son évolution dans l'histoire de la guerre" (1894).

Concep-  
tion of  
Neu-  
trality.

§ 293. Such States as do not take part in a war between other States are neutrals.<sup>1</sup> The term "neutrality" derives from the Latin *neuter*. Neutrality may be defined as *the attitude of impartiality towards belligerents adopted by third States and recognised by belligerents, such attitude creating rights and duties between the impartial States and the belligerents*. Whether or not a third State will adopt and preserve an attitude of impartiality during war

<sup>1</sup> Grotius (III. c. 17) calls them c. 9) *non hostes qui neutrarum mediis in bello*; Bynkershoek (I. partium sunt.

is not a matter of International Law, but of International Politics. Therefore, unless a previous treaty stipulates it expressly, no duty exists for a State, according to International Law, to remain neutral in war. On the other hand, it ought not to be maintained, although this is done by some writers,<sup>1</sup> that every State has by the Law of Nations a right not to remain neutral. The fact is that every Sovereign State, as an independent member of the Family of Nations, is master of its own resolutions, and that the question of remaining neutral or not is, in absence of a treaty stipulating otherwise, one of policy and not of law. However, all such States are supposed to be neutral as do not expressly declare the contrary by word or action, and the rights and duties arising from neutrality come into and remain in existence through the mere fact that a State takes up and preserves an attitude of impartiality and is not dragged into the war by the belligerents themselves. A special assertion of intention to remain neutral is, therefore, legally not necessary on the part of neutral States, although they often expressly and formally proclaim<sup>2</sup> their neutrality.

§ 294. Since neutrality is an attitude of impartiality, it excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to the one as benefit the other. But it requires, on the other hand, active measures from neutral States. For neutrals must prevent belligerents from making use of their neutral territories and of their resources for military and naval purposes during the war. This concerns not only actual fighting on neutral territories, but also transport of troops, war materials, and provisions for the

Neutrality  
an Atti-  
tude of  
Imparti-  
ality.

<sup>1</sup> See, for instance, Bonfils, No. 1443.

<sup>2</sup> See below, § 309.

troops, the fitting out of men-of-war and privateers, the activity of Prize Courts, and the like.

But it must be specially observed that the necessary attitude of impartiality is not incompatible with sympathy with one and antipathy against the other belligerent, as long as such sympathy and antipathy are not realised in actions violating impartiality. Thus, not only public opinion and the Press of a neutral State, but also the Government, may show their sympathy to one party or another without thereby violating neutrality. And it must likewise be specially observed that acts of humanity on the part of neutrals and their subjects, such as the sending of doctors, medicine, provisions, dressing material, and the like, to military hospitals, and the sending of clothes and money to prisoners of war, can never be construed as acts of partiality, although these comforts are provided to the wounded and the prisoners of one of the belligerents only.

Neutrality  
an Atti-  
tude creat-  
ing Rights  
and  
Duties.

§ 295. Since neutrality is an attitude during the condition of war only, this attitude calls into existence special rights and duties which do not generally obtain. They come into existence with the knowledge of the outbreak of war between two States, third States taking up the attitude of impartiality, and they expire *ipso facto* by the termination of the war.

Rights and duties deriving from neutrality do not exist before the outbreak of war, although such outbreak may be expected every moment. Even so-called neutralised States, as Switzerland and Belgium, have during time of peace no duties connected with neutrality, although as neutralised States they have even in time of peace certain duties. These duties are not duties connected with neutrality, but duties

imposed upon the neutralised States as a condition of their neutralisation. They contain restrictions for the purpose of safeguarding the neutralised States from being dragged into war.<sup>1</sup>

§ 296. As International Law is a law between States only and exclusively, neutrality is an attitude of impartiality on the part of States, and not on the part of individuals.<sup>2</sup> Individuals derive neither rights nor duties, according to International Law, from the neutrality of those States whose subjects they are. Neutral States are indeed obliged by International Law to prevent their subjects from committing certain acts, but the duty of these subjects to comply with such injunctions of their Sovereigns is a duty imposed upon them by Municipal, not by International Law. Belligerents, on the other hand, are indeed permitted by International Law to punish subjects of neutrals for breach of blockade, and for carriage of contraband and of analogous of contraband to the enemy; but the duty of subjects of neutrals to comply with these injunctions of belligerents is a duty imposed upon them by these very injunctions of the belligerents, and not by International Law. Although as a rule a State has no jurisdiction over foreign subjects on the Open Sea,<sup>3</sup> either belligerent has, exceptionally, by International Law, the right to punish foreign subjects with confiscation of cargo, and eventually of the vessel itself, in case their vessels break the blockade, carry contraband,

Neutrality  
an Atti-  
tude of  
States.

<sup>1</sup> See above, Vol. I. § 96.

<sup>2</sup> It should be specially observed that it is an inaccuracy of language to speak (as is commonly done in certain cases) of individuals as being neutral. Thus, article 2 of the Geneva Convention speaks of persons employed in hospitals

as participating in the benefit of neutrality. Thus, further, belligerents occupying enemy territory frequently make enemy individuals who are not members of the armed forces of the enemy take a so-called oath of neutrality.

<sup>3</sup> See above, Vol. I. § 146.

or carry analogous of contraband to the enemy ; but the punishment is threatened and executed by the belligerents, not by International Law. Therefore, if neutral merchantmen commit such acts, they neither violate neutrality nor do they act against International Law, but they simply violate injunctions of the belligerents concerned. If they want to run the risk of punishment in the form of losing their property, this is their own concern, and their neutral home State need not prevent them from doing so. But to the right of belligerents to punish subjects of neutrals for the acts specified corresponds the duty of neutral States to acquiesce on their part in the exercise of this right by either belligerent.

Moreover, apart from carriage of contraband, breach of blockade, and maritime transport to the enemy, which a belligerent can punish by capturing and confiscating the vessels or goods concerned, subjects of neutrals are perfectly unhindered in their movements, and neutral States have in especial no duty to prevent their subjects from selling arms, munitions, and provisions to a belligerent, from enlisting in his forces, and the like.

No Cessa-  
tion of In-  
tercourse  
during  
Neutrality  
between  
Neutrals  
and Belli-  
gerents.

§ 297. Neutrality as an attitude of impartiality involves the duty of assisting neither belligerent either actively or passively, but it does not comprise the duty of breaking off all intercourse with the belligerents. Apart from certain restrictions necessitated by impartiality, all intercourse between belligerents and neutrals takes place as before, a condition of peace prevailing between them in spite of the war between the belligerents. This applies particularly to the working of treaties, to diplomatic intercourse, and to trade. But indirectly, of course, the condition of war between belligerents may have a disturbing

influence upon intercourse between belligerents and neutrals. Thus the treaty-rights of a neutral State may be interfered with through occupation of enemy territory by a belligerent; its subjects living on such territory bear enemy character; its subjects trading with the belligerents are hampered by the right of visit and search, and the right of the belligerents to capture blockade-runners and contraband of war.

§ 298. Since neutrality is an attitude during war, the question arises as to the necessary attitude of foreign States during civil war. As civil war becomes real war through recognition<sup>1</sup> of the insurgents as a belligerent Power, it is to be distinguished whether recognition has taken place or not. There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of its being at peace with the legitimate Government. But matters are different after recognition. The insurgents are now a belligerent Power, and the civil war is now real war. Foreign States can either become a party to the war or remain neutral, and in the latter case all duties and rights of neutrality devolve upon them. Since, however, recognition can be granted by foreign States independently of the attitude of the legitimate Government, and since recognition granted by the latter is not at all binding upon foreign Governments, it may happen that insurgents are granted recognition on the part of the legitimate Government, whereas foreign States refuse it, and *vice versa*.<sup>2</sup> In the first case, the rights and duties of neutrality devolve upon foreign States as far as the legitimate Government is concerned. Men-of-war of the latter can visit and

Neutrality  
an  
Attitude  
during  
War (Neu-  
trality in  
Civil  
War).

<sup>1</sup> See above, §§ 59 and 76, and *droit des gens* (1903), pp. 414-447.  
Rougiers, *Les guerres civiles et le*

<sup>2</sup> See above, § 59.



search merchantmen of foreign States for contraband ; a blockade declared by the legitimate Government is binding upon foreign States, and the like. But no rights and duties of neutrality devolve upon foreign States as regards the insurgents. A blockade declared by them is not binding, their men-of-war cannot visit and search merchantmen for contraband. On the other hand, if insurgents are recognised by a foreign State but not by the legitimate Government, such foreign State has all rights and duties of neutrality as far as the insurgents are concerned, but not as far as the legitimate Government is concerned.<sup>1</sup> In practice, however, recognition of insurgents on the part of foreign States will, if really justified, always have the effect that the legitimate Government will no longer refuse recognition.

Neutrality  
to be  
recognised  
by the Bel-  
ligerents.

§ 299. Just as third States have no duty to remain neutral in a war, so they have no right<sup>2</sup> to demand to remain neutral. History reports many cases in which States, although they intended neutrality, were obliged by one or both belligerents to make up their minds and choose the belligerent with whom they must throw in their lot. For neutrality to come into existence it is, therefore, not sufficient that at the outbreak of war a third State takes up an attitude of impartiality, but it is also necessary that the belligerents recognise this attitude by acquiescing in it and by not treating such third State as a party to the

<sup>1</sup> See the body of nine rules regarding the position of foreign States in case of an insurrection, adopted by the Institute of International Law at its meeting at Neuchâtel in 1900 (Annuaire, XVIII. p. 227). The question whether, in case foreign States refuse recognition to insurgents, although the legitimate

Government has granted it, the legitimate Government has a right of visit and search for contraband is controverted, see Annuaire, XVIII. pp. 213-216.

<sup>2</sup> But many writers assert the existence of such a right ; see, for instance, Vattel, § 106 ; Wheaton, § 414 ; Kleen, I. § 2.

war. This does not mean, as has been maintained,<sup>1</sup> that neutrality is based on a contract concluded either *expressis verbis* or by unmistakeable actions between the belligerents and third States, and that, consequently, a third State might at the outbreak of war take up the position of one which is neither neutral nor a party to the war, reserving thereby for itself the freedom of its future resolutions and actions. Since the normal relation between members of the Family of Nations is peace, the outbreak of war between some of the members has the effect that the others become neutrals *ipso facto* by their taking up an attitude of impartiality and by their not being treated by the belligerents as parties to the war. Thus, it is not a contract that calls neutrality into existence, but this condition is rather a legal consequence of a certain attitude at the outbreak of war on the part of third States, on the one hand, and, on the other, on the part of the belligerents themselves.

### III

#### DIFFERENT KINDS OF NEUTRALITY

Vattel, III. §§ 101, 105, 107, 110—Phillimore, III. §§ 138-139—Halleck, II. p. 142—Taylor, § 618—Wheaton, §§ 413-425—Bluntschli, §§ 745-748—Geffcken in Holtzendorff, IV. pp. 634-636—Ullmann, § 163—Despagnet, No. 673—Rivier, II. pp. 370-379—Calvo, IV. §§ 2592-2642—Fiore, III. Nos. 1542-1545—Mérignhac, pp. 347-349—Pillet, pp. 277-284—Kleen, I. §§ 6-22.

§ 300. The very first distinction to be made between different kinds of neutrality is that of perpetual

Perpetual  
Neu-  
trality.

<sup>1</sup> See Heilborn, System, pp. 347 and 350.

and other neutrality. Perpetual or permanent is the neutrality of States which are neutralised by special treaties of the members of the Family of Nations, as at present Switzerland, Belgium, Luxemburg, and the Congo Free State. Apart from duties arising from the fact of their neutralisation and to be performed in time of peace as well as in time of war, the duties and rights of neutrality are the same for neutralised as for other States. It must be specially observed that this concerns not only the obligation not to assist either belligerent, but likewise the obligation to prevent them from making use of the neutral territory for their military purposes. Thus, Switzerland in 1870 and 1871, during the Franco-German War, properly prevented the transport of troops, recruits, and war material of either belligerent over her territory, disarmed the French army which had saved itself by crossing the Swiss frontier, and retained the members of this army until the conclusion of peace.<sup>1</sup>

General  
and  
Partial  
Neu-  
trality.

§ 301. The distinction between general and partial neutrality derives from the fact that a part of the territory of a State may be neutralised,<sup>2</sup> as are, for instance, the Ionian Islands, which are now a part of the territory of the Kingdom of Greece. Such State has the duty to remain always partially neutral—namely, as far as its neutralised part is concerned. In contradistinction to such partial neutrality, general neutrality is the neutrality of States whose territory is in no part neutralised.

Voluntary  
and Con-  
ventional  
Neu-  
trality.

§ 302. A third distinction is that between voluntary and conventional neutrality. Voluntary (or simple or natural) is the neutrality of such State as is not bound by a general or special treaty to remain neutral in a certain war. Neutrality is in most cases

<sup>1</sup> See below, § 339.

<sup>2</sup> See above, § 72.

voluntary, and States whose neutrality is voluntary may at any time during the war give up their attitude of impartiality and take the part of either belligerent. On the other hand, the neutrality of such State as is by treaty bound to remain neutral in a war is conventional. Of course, the neutrality of neutralised States is in every case conventional. Yet not-neutralised States may likewise by treaty be obliged to remain neutral in a certain war, just as in other cases they may by treaty of alliance be obliged not to remain neutral, but to take the part of one of the belligerents.

§ 303. One speaks of an armed neutrality when a neutral State takes military measures for the purpose of defending its neutrality against possible or probable attempts of one or either belligerent to make use of the neutral territory. Thus, the neutrality of Switzerland during the Franco-German War was an armed neutrality. In another sense of the term, one speaks of an armed neutrality when neutral States take military measures for the purpose of defending the real or pretended rights of neutrals against threatening infringements on the part of one or either belligerent. The First and Second Armed Neutrality<sup>1</sup> of 1780 and 1800 were armed neutralities in the latter sense of the term.

Armed  
Neu-  
trality.

§ 304. Treaties stipulating neutrality often stipulate a "benevolent" neutrality of the parties regarding a certain war. The term is likewise frequently used during diplomatic negotiations. However, at present there is no distinction between benevolent neutrality and neutrality pure and simple. The idea dates from former centuries, when the obligations imposed by neutrality were not so stringent and neutral States could favour one of the belligerents in many ways

Benevo-  
lent Neu-  
trality.

<sup>1</sup> See above, §§ 289 and 290.

without thereby violating their neutral attitude. If a State remained neutral in the then lax sense of the term, but otherwise favoured a belligerent, its neutrality was called benevolent.

Perfect  
and Quali-  
fied Neu-  
trality.

§ 305. A distinction of great practical importance is that between perfect, or absolute, and qualified, or imperfect, neutrality. The neutrality is qualified of such State as remains neutral on the whole, but actively or passively, directly or indirectly, gives some kind of assistance to one of the belligerents in consequence of an obligation entered into by a treaty previous to the war and not for the special war exclusively. On the other hand, a neutrality is termed perfect when a neutral State neither actively nor passively, and neither directly nor indirectly, favours either belligerent. There is no doubt that in the eighteenth century, when it was recognised that a State could be considered neutral, although it was by a previous treaty bound to render more or less limited assistance to one of the belligerents, this distinction between neutrality perfect and qualified was justified. But nowadays it is controverted whether a so-called qualified neutrality is neutrality at all, and whether a State, which, in fulfilment of a treaty obligation, renders some assistance to one of the belligerents, violates its neutrality. The majority of modern writers<sup>1</sup> maintain, correctly I think, that from the present condition of International Law a State is either neutral or not, and that a State violates its neutrality in case it renders any assistance what-

<sup>1</sup> See, for instance, Ullmann, § 163; Despagnet, No. 673; Rivier, II. p. 378; Calvo, IV. § 2594; Taylor, § 618; Fiore, III. No. 1541; Kleen, I. § 21; Hall, § 215 (see also Hall, § 219, concerning passage of troops). Phillimore,

III. § 138, goes with the majority of publicists, but in § 139 he thinks that it would be too rigid to consider acts of "minor" partiality which are the result of conventions previous to the war as violations of neutrality.

ever from any motive whatever to one of the belligerents. Consequently, a State which has entered into such obligations would in time of war frequently be in a conflict of duties. For in fulfilling its treaty obligations it would frequently be obliged to violate its duty of neutrality, and *vice versa*. Several writers,<sup>1</sup> however, maintain that such fulfilment of treaty obligations would not contain a violation of neutrality.<sup>2</sup>

§ 306. For the purpose of illustration the following instances of qualified neutrality may be mentioned:—

Some  
Historical  
Examples  
of Quali-  
fied Neu-  
trality.

(1) By a treaty of amity and commerce concluded in 1778 between the United States of America and France, the former granted for the time of war to French privateers and their prizes the right of admission to American ports, and entered into the obligation not to admit the privateers of the enemies of France. When subsequently, in 1793, war was waged between England and France, and England complained of the admission of French privateers to American ports, the United States met the complaint by advancing their treaty obligations.<sup>3</sup>

(2) Denmark had by several treaties, especially by one of 1781, undertaken the obligation to furnish Russia with a certain number of men-of-war and troops. When, in 1788, during war between Russia and Sweden, Denmark fulfilled her obligations towards Russia, she nevertheless declared herself neutral. And although Sweden protested against such possibility of qualified neutrality, she acquiesced in the fact and did not consider herself to be at war against Denmark.<sup>4</sup>

<sup>1</sup> See, for instance, Heffter, § 144; Manning, p. 225; Wheaton, §§ 425-426; Bluntschli, § 746; Halleck, II. p. 142.

<sup>2</sup> See above, § 77, where it has been pointed out that a neutral who takes up an attitude of quali-

fied neutrality may nowadays be considered as an accessory belligerent party to the war.

<sup>3</sup> See Wheaton, § 425, and Phillimore, III. § 139.

<sup>4</sup> See Phillimore, III. § 140.

(3) In 1848, during war between Germany and Denmark, Great Britain, fulfilling a treaty obligation towards Denmark, prohibited the exportation of arms to Germany, whereas such exportation to Denmark remained undisturbed.<sup>1</sup>

(4) In 1900, during the South African War, Portugal, for the purpose of complying with a treaty obligation<sup>2</sup> towards Great Britain regarding the passage of British troops through Portuguese territory in South Africa, allowed such passage to an English force destined for Rhodesia and landed at Beira.<sup>3</sup>

#### IV

#### COMMENCEMENT AND END OF NEUTRALITY

Hall, § 207—Phillimore, I. §§ 392-392A, III. §§ 146-149—Taylor, §§ 610-611—Wheaton, §§ 437-439, and Dana's note 215—Heffier, § 145—Bonfilis, Nos. 1445-1446—Despagnet, No. 674—Rivier, II. pp. 379-381—Martens, II. § 138—Kleen, I. §§ 5, 36-42.

Neutrality  
com-  
mences  
with  
Know-  
ledge of  
the War.

§ 307. Since neutrality is an attitude of impartiality deliberately taken up by a State not implicated in a war, neutrality cannot begin before the outbreak of war becomes known. It is only then that third States can make up their minds whether or not they intend to remain neutral. They are supposed to do this, and the duties deriving from neutrality are incumbent upon them as long as they do not *expressis verbis* or by unmistakable acts declare that they will be parties to the war. It has become the usual practice on the part of belligerents to notify the outbreak of war

<sup>1</sup> See Gefcken in Holtzendorff, (Martens, N.R.G., 2nd ser. XVIII. VI. p. 610, and Rivier, II. p. 379. p. 185.)

<sup>2</sup> Article 11 of the treaty between Great Britain and Portugal concerning the delimitation of spheres of influence in Africa. <sup>3</sup> See below, § 323, and Baty, International Law in South Africa (1900), p. 75.

to third States for the purpose of enabling them to take up the necessary attitude of impartiality, but such notification is in strict law not necessary. The mere fact that a State gets in any way to know of the outbreak of war gives it opportunity to make up its mind regarding its intended attitude, and, if it remains neutral, its neutrality is to be dated from the time of its knowledge of the outbreak of war. But it is apparent that an immediate notification of the war on the part of belligerents is of great importance, as thereby all doubt and controversy regarding the knowledge of the outbreak of war are excluded. For it must be emphasised that a neutral State can in no way be made responsible for acts of its own or of its subjects which have been performed before it knew of the war, although the outbreak of war might be expected.

§ 308. As civil war becomes real war through recognition of the insurgents as a belligerent Power, neutrality during a civil war begins for every foreign State from the moment recognition is granted. That recognition might be granted or refused by foreign States independently of the attitude of the legitimate Government has been stated above in § 298, where also an explanation is given of the consequences of recognition granted either by foreign States alone or by the legitimate Government alone.

Com-  
mence-  
ment of  
Neutrality  
in Civil  
War.

§ 309. Neutrality being an attitude of States creating rights and duties, active measures on the part of a neutral state are required for the purpose of preventing its officials and subjects from committing acts incompatible with its duty of impartiality. Now, the manifesto by which a neutral State orders its organs and subjects to comply with the attitude of impartiality adopted by itself is called declaration or

Establish-  
ment of  
Neutrality  
by Decla-  
rations.



neutrality in the special sense of the term. Such declaration of neutrality must, however, not be confounded, on the one hand, with manifestoes of the belligerents proclaiming to neutrals the rights and duties devolving upon them through neutrality, and, on the other hand, with the assertion given by neutrals to belligerents or *urbi et orbi* that they will remain neutral, these manifestoes and assertions being often also called declarations of neutrality.<sup>1</sup>

Municipal  
Neutrality  
Laws.

§ 310. International Law leaves the provision of necessary measures for the establishment of neutrality to the discretion of each State. Since in constitutional States the powers of Governments are frequently so limited by Municipal Law that they cannot take adequate measures without the consent of their Parliaments, and since it is, as far as International Law is concerned, no excuse for a Government if it is by its Municipal Law prevented from taking adequate measures, several States have once for all enacted so-called Neutrality Laws, which prescribe the attitude to be taken up by their officials and subjects in case the States concerned remain neutral in a war. These Neutrality Laws are latent in time of peace, but their provisions become operative *ipso facto* by the respective States making a declaration of neutrality to their officials and subjects.

British  
Foreign  
Enlist-  
ment Act.

§ 311. After the United States of America had on April 20, 1818, enacted<sup>2</sup> a Neutrality Law, Great Britain followed the example in 1819 with her Foreign Enlistment Act,<sup>3</sup> which was in force till 1870. As this Act did not give adequate powers to the Government, Parliament passed on August 9, 1870, a new Foreign Enlistment Act,<sup>4</sup> which is still in force.

<sup>1</sup> See above, § 293.

<sup>2</sup> Printed in Phillimore, I. pp. 667-672.

<sup>3</sup> 59 Geo. III. c. 69.

<sup>4</sup> 33 and 34 Vict. c. 90. See Appendix I, pp. 483-497.

This Act, in the case of British neutrality, prohibits—  
 (1) The enlistment on the part of a British subject in the military or naval service of either belligerent, and similar acts (sections 4–7); (2) the building, equipping,<sup>1</sup> and despatching<sup>2</sup> of vessels for employment in the military or naval service of either belligerent (sections 8–9); (3) the increase, on the part of any individual living on British territory, of the armament of a man-of-war of either belligerent being at the time in a British port (section 10); (4) the preparing or fitting out of a naval or military expedition against a friendly State (section 11).

It must be specially observed that the British Foreign Enlistment Act goes beyond the require-

<sup>1</sup> According to section 30, the Interpretation Clause of the Act, "equipping" includes "the furnishing of a ship with any tackle, apparel, furniture, provisions, arms, munitions or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service." It is, therefore, not lawful for British ships, in case Great Britain is neutral, to supply a belligerent fleet direct with coal, a point which became of interest during the Russo-Japanese War. German steamers laden with coal followed the Russian fleet on her journey to the Far East, and British shipowners were prevented from doing the same by the Foreign Enlistment Act. And it was in application of this Act that the British Government ordered, in 1904, the detention of the German steamer "Captain W. Menzel," which took in Welsh coal at Cardiff for the purpose of carrying it to the Russian fleet *en route* to the Far East. See below, § 350.

<sup>2</sup> An interesting case which ought here to be mentioned oc-

curred in October 1904, during the Russo-Japanese War. Messrs. Yarrow & Co., the ship-builders, possessed a partly completed vessel, the "Caroline," which could be finally fitted up either as a yacht or as a torpedo-boat. In September 1904, a Mr. Sinnet and the Hon. James Burke Roche called at the shipbuilding yard of Messrs. Yarrow, bought the "Caroline," and ordered her to be fitted up as a high-speed yacht. The required additions were finished on October 3. On October 6 the vessel left Messrs. Yarrow's yard and was navigated by a Captain Ryder, *via* Hamburg, to the Russian port of Libau, there to be altered into a torpedo-boat. That section 8 of the Foreign Enlistment Act applies to this case there is no doubt. But there is no doubt either that it is this Act, and not the rules of International Law, which required the prosecution of Messrs. Sinnet and Roche on the part of the British Government. For, if viewed from the basis of International Law, the case is merely one of contraband. See below, §§ 321, 334, and 397.

ments of International Law in so far as it tries to prohibit and penalises a number of acts which a neutral State is not according to the present rules of International Law required to prohibit and penalise. Thus, for instance, a neutral State need not prohibit its private subjects from enlisting in the service of a belligerent; from supplying coal, provisions, arms, and ammunition direct to a belligerent fleet, providing such fleet is not within or just outside the territorial waters of the neutral concerned; from selling ships to a belligerent although it is known that they will be converted into cruisers or used as transport ships.

End of  
Neu-  
trality.

§ 312. Neutrality ends with the war, or through the commencement of war by a hitherto neutral State against one of the belligerents, or through one of the belligerents commencing war against a hitherto neutral State. Since, apart from the case of a treaty obligation, no State has by International Law the duty to remain neutral in a war between other States,<sup>1</sup> or, if it is a belligerent, to allow a hitherto neutral State to remain neutral,<sup>2</sup> it does not constitute a violation of neutrality on the part of the hitherto neutral to begin war against one of the belligerents, and on the part of a belligerent to begin war against a neutral. Duties of neutrality exist as long only as a State remains neutral. They come to an end *ipso facto* by a hitherto neutral State's throwing up its neutrality, or by a belligerent's beginning war against a hitherto neutral State. But the ending of neutrality must not be confounded with violation of neutrality. Such violation does not *ipso facto* bring neutrality to an end, as will be shown below in § 358.

<sup>1</sup> See above, § 293.

<sup>2</sup> See above, § 299.

## CHAPTER II

### RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS

#### I

##### RIGHTS AND DUTIES DERIVING FROM NEUTRALITY

Vattel, III. § 104—Hall, § 214—Phillimore, III. §§ 136-138—Twiss, II. § 216—Heffter, § 146—Geffcken in Holtzendorff, IV. pp. 656-657—Garais, § 88—Liszt, § 42—Ullmann, § 164—Bonfil, Nos. 1441-1444—Despagnet, Nos. 671 and 675—Rivier, II. pp. 381-385—Calvo, IV. §§ 2491-2493—Fiore, III. Nos. 1501, 1536-1540—Martens, II. § 131—Kleen, I. §§ 45-46—Mérignhac, pp. 339-342—Pillet, pp. 273-275.

§ 313. Neutrality can be carried out only if neutrals as well as belligerents follow a certain line of conduct in their relations with one another. It is for this reason that from neutrality derive rights and duties, as well for belligerents as for neutrals, and that, consequently, neutrality can be violated as well by belligerents as by neutrals. These rights and duties are correspondent: the duties of neutrals correspond to the rights of either belligerent, and the duties of either belligerent correspond to the rights of the neutrals.

Conduct  
in General  
of Neu-  
trals and  
Belliger-  
ents.

§ 314. There are two rights and two duties deriving from neutrality for neutrals, and likewise two for belligerents. Duties of neutrals are, first, to act toward belligerents in accordance with their attitude of impartiality; and, secondly, to acquiesce in the exercise on the part of either belligerent of his right to punish neutral merchantmen for breach of

What  
Rights  
and  
Duties of  
Neutrals  
and of Bel-  
ligerents  
there are.

blockade, carriage of contraband, and carriage of analogous of contraband for the enemy, and accordingly to visit, search, and eventually capture them.

The duties of either belligerent are, first, to act towards neutrals in accordance with their attitude of impartiality; and, secondly, not to suppress their intercourse, and in especial their commerce, with the enemy.<sup>1</sup>

Either belligerent has a right to demand impartiality from neutrals, whereas, on the other hand, neutrals have a right to demand such behaviour from either belligerent as is in accordance with their attitude of impartiality. Neutrals have a right to demand that their intercourse, and in especial their commerce, with the enemy shall not be suppressed; whereas, on the other hand, either belligerent has the right to punish subjects of neutrals for breach of blockade, carriage of contraband, and the like, and accordingly to visit, search, and capture neutral merchantmen.

Rights  
and  
Duties of  
Neutrals  
contested.

§ 315. Some writers<sup>2</sup> maintain that no rights derive from neutrality for neutrals, and, consequently no duties for belligerents, because everything which must be left undone by a belligerent regarding his relations with a neutral must likewise be left undone in time of peace. But this opinion has no foundation. Indeed, it is true that the majority of the acts which belligerents must leave undone in consequence of their duty to respect neutrality must likewise be

<sup>1</sup> All writers on International Law resolve the duty of impartiality incumbent upon neutrals into many several duties, and they do the same as regards the duty of belligerents—namely, to act toward neutrals in accordance with the latter's impartiality. In this

way quite a large catalogue of duties and corresponding rights are produced, and the whole matter is unnecessarily complicated.

<sup>2</sup> Heffter, § 149; Gareis, § 88; Heilborn, System, p. 341.

left undone in time of peace in consequence of the territorial supremacy of every State. However, there are several acts which do not belong to this class—for instance, the non-appropriation of enemy goods on neutral vessels. And those acts which do belong to this class fall nevertheless at the same time under another category. Thus, a violation of neutral territory on the part of a belligerent for military and naval purposes of the war is indeed an act prohibited in time of peace, because every State has to respect the territorial supremacy of other States ; but it is at the same time a violation of neutrality, and therefore totally different from other violations of foreign territorial supremacy. This becomes quite apparent when the true inwardness of such acts is regarded. For every State has a right to demand reparation for an ordinary violation of its territorial supremacy, but it has no duty to demand such reparation, it might not take any notice of it, or overlook it. Yet in case a violation of its territorial supremacy constitutes at the same time a violation of its neutrality, the neutral State has not only a right to demand reparation, but has a duty to do so. For, if it did not, this would contain a violation of its duty of impartiality, because it would be favouring one belligerent to the detriment of the other.<sup>1</sup>

On the other hand, it has been asserted<sup>2</sup> that, apart from conventional neutrality, from which treaty obligations arise, it is incorrect to speak of duties deriving from neutrality, since at every moment during the war neutrals could throw up neutrality and become parties to the war. With this opinion I cannot agree either. That a hitherto neutral can at any moment throw up neutrality and take part

<sup>1</sup> See below, § 360.

<sup>2</sup> Gareis, § 88 ; Ullmann, § 164.

in the war, is just as true as that a belligerent can at any moment during the war declare war against a hitherto neutral State. Yet this only proves that there is no duty to remain neutral, and no duty for a belligerent to abstain from declaring war against a hitherto neutral State. This is a truism which ought not to be doubted, and is totally different from the question what duties derive from neutrality as long as a certain State remains neutral at all. The assertion that such duties derive from neutrality is in no way inconsistent with the fact that neutrality itself can at any moment during the war come to an end through the beginning of war by either a neutral or a belligerent. This assertion only states the fact that, as long as neutrals intend neutrality and as long as belligerents intend to recognise such neutrality of third States, duties derive from neutrality for both belligerents and neutrals.

Contents  
of Duty  
of Impar-  
tiality.

§ 316. It has already been stated above, in § 294, that impartiality *excludes* such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to one of the belligerents as benefit the other, and that it *includes* active measures on the part of neutrals for the purpose of preventing belligerents from making use of neutral territories and neutral resources for their military and naval purposes. But all this does not exhaust the contents of the duty of impartiality.

It must, on the one hand, be added that according to the present strict conception of neutrality the duty of impartiality of a neutral *excludes* any facilities whatever for military and naval operations of the belligerents, even if granted to both belligerents alike. In former times assistance was not considered a violation of neutrality, provided it was given to

both belligerents in the same way, and States were considered neutral although they allowed an equal number of their troops to fight on the side of either belligerent. To-day this could no longer happen. And the majority of writers agree that any facility whatever directly concerning military or naval operations, even if it consists only in granting passage over neutral territory to belligerent forces, is illegal, although granted to both belligerents alike. *The duty of impartiality comprises to-day abstention from any active or passive co-operation with belligerents.*

On the other hand, it must be added that the duty of impartiality *includes* the equal treatment of both belligerents regarding such facilities as do not directly concern military or naval operations, and which may, therefore, be granted or not to belligerents, according to the discretion of a neutral. If a neutral grants such facilities to one belligerent, he must grant them to the other in the same degree. If he refuses them to the one, he must likewise refuse them to the other. Thus, since it does not, according to the International Law of the present day, constitute a violation of neutrality that a neutral allows his subjects to supply in the ordinary way of trade either belligerent with arms and ammunition, it would constitute a violation of neutrality to prohibit the export of arms destined for one of the belligerents only. Thus, further, if a neutral allows men-of-war of one of the belligerents to bring their prizes into neutral ports, he must grant the same facility to the other belligerent.<sup>1</sup>

§ 317. Although neutrality has already for centuries been recognised as an attitude of impartiality,

Duty of  
Impartiality  
continuously

<sup>1</sup> See the cases quoted above in § 306.



growing  
more  
intense.

it took two hundred years for the duty of impartiality to attain its present range and intensity. Now this continuous developement has by no means ceased. It is slowly and gradually going on, and there is no doubt that during the twentieth century the duty of impartiality will become much more intense than it is at present. The fact that the intensity of this duty is the result of gradual development bears upon many practical questions regarding the conduct of neutrals. It is therefore necessary to discuss the relations between neutrals and belligerents separately for the purpose of ascertaining what line of conduct must be followed by neutrals. The following sections of this chapter will therefore deal with—Neutrals and Military Operations (§§ 320–328); Neutrals and Military Preparations (§§ 329–335); Neutral Asylum to Soldiers and War Materials (§§ 336–341); Neutral Asylum to Naval Forces (§§ 342–348); Supplies and Loans to Belligerents (§§ 349–352); Services to Belligerents (§§ 353–356).

Contents  
of Duty  
of Belligerents  
to treat  
Neutrals  
in accordance  
with  
their  
impartiality.

§ 318. Whereas the relations between neutrals and belligerents require detailed discussion with regard to the duty of impartiality incumbent upon neutrals, the contents of the duty of belligerents to treat neutrals in accordance with their impartiality are so manifest as to dispense with elaborate treatment. Such duty *excludes*, first, any violation of neutral territory for military or naval purposes of the war; and, secondly, the appropriation of neutral goods, contraband excepted, on enemy vessels.<sup>1</sup> On the other hand, such duty *includes*, first, due treatment of neutral diplomatic envoys accredited to the

<sup>1</sup> This is stipulated by the Declaration of Paris, 1856; see below, Appendix II. (p. 498).

enemy and found on occupied enemy territory ; and, secondly, due treatment of neutral subjects and neutral property on enemy territory. A belligerent who conquers enemy territory must at least grant to neutral envoys accredited to the enemy the right to quit unmolested the occupied territory.<sup>1</sup> And such belligerent must likewise abstain from treating neutral subjects and property established on enemy territory more harshly than the laws of war allow ; for, although neutral subjects and property have by being established on enemy territory acquired enemy character, they have nevertheless not lost the protection of their neutral home State.<sup>2</sup> And such belligerent must, lastly, pay full damages in case he makes use of his right of angary<sup>3</sup> against neutral property transitorily on enemy territory.

§ 319. The duty of either belligerent not to suppress intercourse of neutrals with the enemy requires no detailed discussion either. It is a duty which is in accordance with the development of the institution of neutrality. It is of special importance with regard to commerce of subjects of neutrals with belligerents, since formerly attempts have frequently been made to intercept all neutral trade with the enemy. A consequence of the now recognised freedom of neutral commerce with either belligerent is the rule, enacted by the Declaration of Paris of 1856, that enemy goods, with the exception of contraband, on neutral vessels on the Open Sea or in enemy territorial waters cannot be appropriated by a belligerent. But the recognised freedom of

Contents  
of Duty  
not to  
suppress  
Inter-  
course  
between  
Neutrals  
and the  
Enemy.

<sup>1</sup> The position of foreign envoys found by a belligerent on occupied enemy territory is not settled as regards details. But there is no doubt that a certain consideration

is due to them, and that they must at least be granted the right to leave. See above, vol. I. § 399.

<sup>2</sup> See above, § 90.

<sup>3</sup> See below, §§ 364-367.

neutral commerce necessitates, on the other hand, certain measures on the part of belligerents. It would be unreasonable to impose on a belligerent a duty not to prevent the subjects of neutrals from breaking a blockade established by him; further, from carrying contraband to the enemy; and, lastly, from rendering services of maritime transport to the enemy. International Law gives, therefore, a right to either belligerent to interdict all such acts to neutral merchantmen, and, accordingly, to visit, search, capture, and punish them.<sup>1</sup>

## II

### NEUTRALS AND MILITARY OPERATIONS

Vattel, III. §§ 105, 118-135—Hall, §§ 215, 219, 220, 226—Lawrence, §§ 253-255—Manning, pp. 225-227, 245-250—Twiss, II. §§ 217, 218, 228—Halleck, II. pp. 146, 165, 172—Taylor, §§ 618, 620, 632, 635—Walker, §§ 55, 57, 59-61—Wharton, III. §§ 397-400—Wheaton, §§ 426-429—Bluntschli, §§ 758, 759, 763, 765, 769-773—Heffter, §§ 146-150—Geffcken in Holtzendorff, IV. pp. 657-676—Ullmann, § 164—Bonfil, Nos. 1449-1457, 1460, 1469, 1470—Rivier, II. pp. 395-408—Calvo, IV. §§ 2644-2664, 2683—Fiore, III. Nos. 1546-1550, 1574-1575, 1582-1584—Martens, II. §§ 131-134—Kleen, I. §§ 70-75, 116-122—Mérignhac, pp. 352-380—Pillet, pp. 284-289—Perels, § 39—Testa, pp. 173-180—Hailborn, Rechte, pp. 4-12—Dupuis, Nos. 308-310, 315-317.

Hostilities  
by and  
against  
Neutrals.

§ 320. The duty of impartiality incumbent upon a neutral must obviously prevent him from committing hostilities against either belligerent. This needs no mention were it not for the purpose of distinction between hostilities on the one hand, and, on the other,

<sup>1</sup> That a subject of a neutral State who tries to break a blockade, or carries contraband to the enemy, or renders the enemy services of maritime transport by carrying analogous of contraband, does violate injunctions of the belligerent concerned, but not International Law, will be shown below, §§ 383, 398, and 407.

military or naval acts of force by a neutral for the purpose of repulsing violations of his neutrality committed on the part of either belligerent. Hostilities of a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned. If, however, a neutral does not attack a belligerent, but only repulses him by force when he violates or attempts to violate the neutrality of the neutral, such repulse does not comprise hostilities. Thus, if men-of-war of a belligerent attack an enemy vessel in a neutral port and are repulsed by neutral men-of-war, or if belligerent forces try to enforce a passage through neutral territory and are forcibly prevented by neutral troops, no hostilities have been committed by the neutral, who has done nothing else than fulfil his duty of impartiality. It must specially be emphasised that it is no longer legitimate for a belligerent to pursue military or naval forces who take refuge on neutral territory. Should, nevertheless, a belligerent do this, he must, if possible, be repulsed by the neutral.

It is, on the other hand, likewise obvious that hostilities against a neutral on the part of either belligerent are acts of war, and not mere violations of neutrality. If, however, belligerent forces attack enemy forces which have taken refuge on neutral territory or which are there for other purposes, such acts are not hostilities against the neutral, but mere violations of neutrality which must be repulsed or for which reparation must be made, as the case may be.

Quite a peculiar condition arose at the outbreak of and during the Russo-Japanese War. The ends for which Japan went to war were the expulsion of the

Russian forces from the Chinese Province of Manchuria and the liberation of Korea from the influence of Russia. Manchuria and Korea became therefore the theatre of war, although both were neutral territories and although neither China nor Korea became parties to the war. The hostilities which occurred on these neutral territories were in no wise directed against the neutrals concerned. This anomalous condition of matters arose out of the inability of both China and Korea to free themselves from Russian occupation and influence. And Japan considered her action, which must be classified as an intervention, justified on account of her vital interests. The Powers recognised this anomalous condition by influencing China not to take part in the war and by influencing the belligerents not to extend military operations beyond the borders of Manchuria. Manchuria and Korea having become the theatre of war,<sup>1</sup> the hostilities committed there by the belligerents against one another cannot be classified as a violation of neutrality. The case of the "Variag" and the "Koriets" on the one hand, and, on the other, the case of the "Reshitelni," may illustrate the peculiar condition of affairs.

(1) On February 8, 1904, a Japanese squadron under Admiral Uriu entered the Korean harbour of Chemulpo and disembarked Japanese troops. The next morning Admiral Uriu requested the commanders of two Russian ships in the harbour of Chemulpo, the "Variag" and the "Koriets," to leave the harbour and engage him in battle outside, threatening attack inside the harbour in case they would not comply with his request. But the Russian ships did comply, and the battle took place outside,

<sup>1</sup> See above, § 71, p. 81, and Lawrence, War, pp. 268-294.

but within Korean territorial waters.<sup>1</sup> The Russian complaint that the Japanese violated in this case Korean neutrality would seem to be unjustified, since Korea fell within the region and the theatre of war.

(2) The Russian destroyer "Reshitelni," one of the vessels that escaped from Port Arthur on August 10, 1904, took refuge in the Chinese harbour of Chifu. On August 12, two Japanese destroyers entered the harbour, captured the "Reshitelni," and towed her away.<sup>2</sup> There is no doubt that this act of the Japanese comprises a violation of neutrality,<sup>3</sup> since Chifu does not belong to the part of China which fell within the region of war.

§ 321. If a State remains neutral, it violates its impartiality by furnishing a belligerent with troops or men-of-war. And it matters not whether a neutral renders such assistance to one of the belligerents or to both alike.

Furnish-  
ing of  
Troops  
and Men-  
of-War to  
Belliger-  
ents.

However, the question is controverted whether a neutral State, which has in time of peace concluded a treaty with one of the belligerents to furnish him in case of war with a limited number of troops, violates its neutrality by fulfilling its treaty obligation. Several writers<sup>4</sup> answer the question in the negative, and there is no doubt that during the eighteenth century such cases have happened. But no case has, as far as I know, happened during the nineteenth century, and the majority of writers are now correctly of opinion that such furnishing of troops constitutes a violation of neutrality.

<sup>1</sup> See Lawrence, War, pp. 279-289.

<sup>2</sup> See Lawrence, War, pp. 291-294.

<sup>3</sup> See below, § 361, where the case of the "General Armstrong" is discussed.

<sup>4</sup> See, for instance, Bluntschli, § 759, and Heffter, § 144. See above, § 306 (2), where the case is quoted of Denmark furnishing troops to Russia in 1788 during a Russo-Swedish war.

As regards furnishing of men-of-war to belligerents, the question arose during the Russo-Japanese War whether a neutral violates his duty of impartiality by allowing his national steamship companies to sell to a belligerent such of their liners as are in case of war destined to be incorporated as cruisers in the national navy. The question was discussed in the Press on account of the sale to Russia of the "Augusta Victoria" and the "Kaiserin Maria Theresia" by the North German Lloyd, and the "Fürst Bismarck" and the "Columbia" by the Hamburg-American Line, vessels which were at once enrolled in the Russian Navy as second-class cruisers, re-christened as the "Kuban," "Ural," "Don," and "Terek." Had these vessels, according to an arrangement with the German Government, really been auxiliary cruisers to the German Navy, and provided the German Government gave its consent to the transaction, a violation of neutrality would have been committed by Germany. But the German Press maintained that these vessels had not been auxiliary cruisers to the Navy, and Japan did not lodge a protest with Germany on account of the sale. And if these liners were not auxiliary cruisers to the German Navy, their sale to Russia was a legitimate sale of articles of contraband.<sup>1</sup>

Subjects  
of  
Neutrals  
fighting  
among  
Belli-  
gerent  
Forces.

§ 322. The duty of impartiality incumbent upon neutrals does not at present include any necessity for them to prevent their private subjects from enlisting in the military or naval service of the belligerents, although several States, as Great Britain<sup>2</sup> and the United States of America, by their Municipal Law prohibit their subjects from doing so. But a neutral must recall his military and naval officers who may have

<sup>1</sup> See below, § 397.

<sup>2</sup> See Section 4 of the Foreign Enlistment Act, 1870.

been serving in the army or navy of either belligerent before the outbreak of war. A neutral must, further, retain military and naval officers who want to resign their commissions for the obvious purpose of enlisting in the service of either belligerent. The fact, therefore, that in 1877, during war between Turkey and Servia, Russian officers left the Russian and entered the Servian Army as volunteers with permission of the Russian Government, contained a violation of the duty of impartiality on the part of neutral Russia.

On the other hand, there is no violation of neutrality in a neutral allowing surgeons and such other non-combatant members of his army as are vested with neutral character according to the Geneva Convention to enlist or to remain in the service of either belligerent.

§ 323. In contradistinction to the practice of the eighteenth century,<sup>1</sup> it is now generally recognised that a violation of the duty of impartiality is involved when a neutral allows a belligerent the passage of troops or the transport of war material over his territory. And it matters not whether a neutral give such permission to one of the belligerents only, or to both alike. The practice of the eighteenth century was a necessity, since many German States consisted of parts distant from one another, so that their troops had to pass through other Sovereigns' territories for the purpose of reaching outlying parts. At the beginning of the nineteenth century the passing of belligerent troops through neutral territory still occurred. Prussia, although she at first repeatedly refused it, at last entered in 1805 into a secret convention with Russia granting Russian troops passage through Silesia

Passage  
of Troops  
and War  
Material  
through  
Neutral  
Territory.

<sup>1</sup> See Vattel, III. §§ 119-132.



during war with France. On the other hand, even before Russia had made use of this permission, Napoleon ordered Bernadotte to march French troops through the then Prussian territory of Anspach without even asking the consent of Prussia. In spite of the protest of the Swiss Government, Austrian troops passed through Swiss territory in 1813, and when in 1815 war broke out again through the escape of Napoleon from the Island of Elba and his return to France, Switzerland granted to the allied troops passage through her territory.<sup>1</sup> But since that time it became generally recognised that all passage of belligerent troops through neutral territory must be prohibited, and the Powers declared *expressis verbis* in the Act of November 20, 1815, which neutralised Switzerland, and was signed at Paris,<sup>2</sup> that "no inference unfavourable to the neutrality and inviolability of Switzerland can and must be drawn from the facts which have caused the passage of the allied troops through a part of the territory of the Swiss Confederation." The few instances<sup>3</sup> in which during the nineteenth century States pretended to remain neutral, but nevertheless allowed the troops of one of the belligerents the passage through their territory, led to war between the neutral and the other belligerent.

However, just as in the case of furnishing troops so in the case of passage, it is a moot point whether passage of troops can be granted without thereby violating the duty of impartiality incumbent upon a neutral, in case a neutral is required to grant it in consequence of an existing State-servitude or of a treaty previous to the war. The majority of writers,

<sup>1</sup> See Wheaton, §§ 418-420.

<sup>2</sup> See Martens, N.R., II. p. 741.

<sup>3</sup> See Heilborn, Rechte, pp. 8-9.

correctly I think, maintain that, according to the present intensity of the duty of impartiality incumbent upon neutrals, the question must be answered in the negative.<sup>1</sup>

§ 324. Different from the passage of troops is that of wounded soldiers. If a neutral grants such passage, he certainly does not render direct assistance to the belligerent concerned. But it may well be that indirectly it contains assistance on account of the fact that a belligerent, thereby relieved from transport of his wounded, can now use the lines of communication for the transport of troops, war material, and provisions. Thus, when in 1870 after the battles of Sedan and Metz, Germany applied to Belgium and Luxemburg to allow her wounded to be sent through their territories, France protested on the ground that the relief thereby created to the lines of communication in the hands of the Germans would be an assistance to the military operations of the German Army. Belgium, on the advice of Great Britain, did not grant the German application, but Luxemburg granted it.<sup>2</sup>

Passage of  
Wounded  
through  
Neutral  
Territory.

Article 59 of the Hague Regulations expressly now authorises a neutral to grant the passage of wounded to a belligerent under the condition that trains bringing the wounded shall carry neither combatants nor war material, and that those among the wounded who belong to the army of the other belligerent shall remain on the neutral territory, shall there be guarded by the neutral Government, and shall, after they have recovered, be prevented from returning to their home State and rejoining

<sup>1</sup> See above, § 306, and also above, vol. I. § 207. Claus, *Die Lehre von den Staatsdienstbarkeiten* (1894), pp. 212-217, must

likewise be referred to.

<sup>2</sup> See Hall, § 219, and Geffcken in Holtzendorff, IV. p. 664.

their corps. Through the stipulation of this article 59 it is left to the consideration of a neutral whether he will or will not grant the passage of wounded. He will, therefore, have to investigate every case and come to a conclusion according to its merits.

Passage of  
Men-of-  
War.

§ 325. In contradistinction to passage of troops through his territory, the duty of impartiality incumbent upon a neutral does not require him to exclude the passage of belligerent men-of-war through the maritime belt of sea making a part of his territorial waters. Since, as stated above in Vol. I. § 188, every littoral State can even in time of peace prohibit the passage of foreign men-of-war through its maritime belt, provided such belt does not form a part of the highways for international traffic, it can certainly prohibit the passage of belligerent men-of-war in time of war. However, no duty exists for a neutral to prohibit such passage in time of war, and he need not exclude belligerent men-of-war from his ports either, although he can do this likewise. The reason is that such passage and such admittance into ports contains very little assistance indeed, and is justified by the character of the sea as an international high road. But it is, on the other hand, obvious that belligerent men-of-war must not commit any hostilities against enemy vessels during their passage, and must not use the neutral maritime belt and neutral ports as a basis for their operations against the enemy.<sup>1</sup>

Occupation of  
Neutral  
Territory  
by Bel-  
ligerents.

§ 326. In contradistinction to the practice of the eighteenth century,<sup>2</sup> the duty of impartiality must nowadays prevent a neutral from permitting to belligerents the occupation of a neutral fortress or any other part of neutral territory. If a previous

<sup>1</sup> See below, § 333.

<sup>2</sup> See Kleen, I. § 116.

treaty should have stipulated such occupation, the latter cannot be granted without violation of neutrality.<sup>1</sup> On the contrary, the neutral must even use force to prevent belligerents from occupying any part of his neutral territory. The question whether such occupation on the part of a belligerent could be justified in the case of extreme necessity on account of the neutral's inability to prevent the other belligerent from making use of the neutral territory as a base for his military operations must, I think, be answered in the affirmative, since an extreme case of necessity in the interest of self-preservation must be considered as an excuse.<sup>2</sup>

§ 327. It is now generally recognised that the duty of impartiality prevents a neutral from permitting a belligerent to set up Prize Courts on neutral territory. The intention of a belligerent in setting up a court on neutral territory can only be to facilitate the plundering of the commerce of the enemy by his men-of-war. A neutral tolerating such Prize Courts would, therefore, indirectly assist the belligerent in his naval operations. During the eighteenth century it was not considered at all illegitimate on the part of neutrals to allow the setting up of Prize Courts on their territory. The *Règlement du Roi de France concernant les prises qui seront conduites dans les ports étrangers, et des formalités que doivent remplir les Consuls de S.M. qui y sont établis* of 1779, furnishes a striking proof of it.

Prize  
Courts on  
Neutral  
Territory.

<sup>1</sup> See Klüber, § 281, who asserts the contrary.

<sup>2</sup> See Vattel, III. § 122; Bluntschli, § 782; Calvo, IV. § 2642. Kleen, I. § 116, seems not to recognise an extreme necessity of the kind mentioned above as an excuse.—There is a difference

between this case and the case which arose at the outbreak of the Russo-Japanese War, when both belligerents invaded Korea, for it was explained above in § 320 that Korea and Manchuria fell within the region and the theatre of war.

But since in 1793 the United States of America disorganised the French Prize Courts set up by the French envoy Genêt on her territory,<sup>1</sup> it became recognised that such Prize Courts are inconsistent with the duty of impartiality incumbent upon a neutral.

Sale of  
Prizes,  
and their  
Safe-keep-  
ing on  
Neutral  
Territory.

§ 328. It would, no doubt, be an indirect assistance to naval operations of a belligerent if a neutral would allow him to organise on neutral territory sales of prizes or their safe-keeping. Indeed, at present it is still in the discretion of a neutral whether he will or will not temporarily admit into a neutral port a belligerent man-of-war in company with her prize.<sup>2</sup> If a neutral, however, were to allow a belligerent to use neutral ports as shelters where prizes might be kept safe from recapture, he would undoubtedly assist naval operations of the belligerent and thereby violate his duty of impartiality.

But different from the organisation of sales of prizes or of their safe-keeping on neutral territory is the exceptional case of sale or safe-keeping of an unseaworthy prize. Although a neutral need not admit or keep such prize, or admit its sale, he can do it without being considered to render assistance to the belligerent concerned; but he can admit the sale only after the competent Prize Court has condemned the vessel.<sup>3</sup>

<sup>1</sup> See above, § 291 (1).

<sup>2</sup> But most maritime States no longer admit men-of-war in company with their prizes.

<sup>3</sup> See Kleen, I. § 115.

## III

## NEUTRALS AND MILITARY PREPARATIONS

Hall, §§ 217-218, 221-225—Lawrence, §§ 256-263—Manning, pp. 227-244—Phillimore, III. §§ 142-151B—Twiss, II. §§ 223-225—Hallack, II. pp. 152-163—Taylor, §§ 616, 619, 626-628—Walker, §§ 62-66—Wharton, III. §§ 392, 395-396—Wheaton, §§ 436-439—Heffter, §§ 148-150—Geffcken in Holtzendorff, IV. pp. 658-660, 676-684—Ullmann, § 164—Bonfils, Nos. 1458-1459, 1464-1466—Rivier, II. pp. 395-408—Calvo, IV. §§ 2619-2627—Fiore, III. Nos. 1551-1570—Kleen, I. §§ 76-89, 114—Mérignhac, pp. 358-360—Pillet, pp. 288-290—Dupuis, Nos. 322-331.

§ 329. Although according to the present intensity of the duty of impartiality neutrals need not<sup>1</sup> prohibit their subjects from supplying belligerents with arms and the like in the ordinary way of trade, a neutral must<sup>2</sup> prohibit belligerents from erecting and maintaining on his territory depôts and factories of arms, ammunitions, and military provisions. However, belligerents can easily evade this by not keeping depôts and factories, but contracting with subjects of the neutral concerned in the ordinary way of trade for any amount of arms, ammunition, and provisions.<sup>3</sup>

Depôts  
and Fac-  
tories on  
Neutral  
Territory.

§ 330. In former centuries neutrals were not required to prevent belligerents from levying troops on their neutral territories, and a neutral often used to levy troops himself on his territory for belligerents without thereby violating his duty of impartiality as understood in those times. In this way the Swiss Confederation frequently used to furnish belligerents,

Levy of  
Troops,  
and the  
like.

<sup>1</sup> See below, § 350.

<sup>2</sup> See Bluntschli, § 777, and Kleen, I. § 114.

<sup>3</sup> The distinction made by some writers between an occasional supply on the one hand, and, on

the other, an organised supply in large proportions by subjects of neutrals, and the assertion that the latter must be prohibited by the neutral concerned, is not justified. See below, § 350.

and often both parties, with thousands of recruits, although she herself always remained neutral. But at the end of the eighteenth century a movement started tending to change this practice. In 1793 the United States of America interdicted the levy of troops on her territory for belligerents, and by-and-by many other States followed the example. At present the majority of writers maintain, correctly I think, that the duty of impartiality must prevent a neutral from allowing the levy of troops. The few<sup>1</sup> writers who still differ make it a condition that a neutral, if he allows such levy at all, must allow it to both belligerents alike.

His duty of impartiality must likewise prevent a neutral from allowing a belligerent man-of-war reduced in her crew to enrol sailors in his ports, with the exception of such few men as are absolutely necessary for the vessel to enable her to navigate to the nearest home port.<sup>2</sup>

A pendant to the levy of troops on neutral territory was the granting of Letters of Marque to vessels belonging to the merchant marine of neutrals. Since privateering has practically disappeared, the question need not be discussed whether neutrals must prohibit their subjects from accepting Letters of Marque from a belligerent.<sup>3</sup>

Passage  
of Bodies  
of Men  
intending  
to enlist.

§ 331. A neutral is not obliged by his duty of impartiality to interdict passage through his territory to men either singly or in numbers intending to enlist. Thus in 1870 Switzerland did not object to Frenchmen travelling through Geneva for the pur-

<sup>1</sup> See, for instance, Twiss, II. § 225, and Bluntschli, § 762.

<sup>2</sup> See below, §§ 333 (3), and 346.

<sup>3</sup> See above, § 83. To the asser-

tion of many writers that a subject of a neutral who accepts Letters of Marque from a belligerent can be treated as a pirate, I cannot consent. See above, Vol. I. § 273.

pose of reaching French corps and to Germans travelling through Basle for the purpose of reaching German corps, under the condition, however, that these men travelled without arms and uniform. On the other hand, when France during the Franco-German War organised an office<sup>1</sup> in Basle for the purpose of sending bodies of Alsatian volunteers through Switzerland to the South of France, Switzerland correctly prohibited this on account of the fact that this *official* organisation of the passage of volunteers through her neutral territory was more or less equal to a passage of troops.

§ 332. If the levy and passage of troops must be prevented by a neutral, he is all the more required to prevent the organisation of a hostile expedition from his territory against either belligerent. Such organisation takes place when a band of men combine under a commander for the purpose of starting from the neutral territory and joining the belligerent forces. Different, however, is the case in which a number of individuals, not organised into a body under a commander, start in company from a neutral State for the purpose of enlisting with one of the belligerents. Thus in 1870, during the Franco-German War, 1,200 Frenchmen started from New York in two French steamers for the purpose of joining the French Army. Although the vessels carried also 96,000 rifles and 11,000,000 cartridges, the United States did not interfere, since the men were not organised in a body, and since, on the other hand, the arms and ammunition were carried in the way of ordinary commerce.<sup>2</sup>

Organisa-  
tion of  
Hostile  
Expedi-  
tions.

§ 333. Although a neutral is not required by his duty of impartiality to prohibit the passage of belli-

Use of  
Neutral  
Territory  
as Base of

<sup>1</sup> See Bluntschli, § 770.

<sup>2</sup> See Hall, § 222.



Naval  
Opera-  
tions.

gerent men-of-war through his maritime belt, and the temporary stay of such vessels in his ports, it is generally recognised that he must not allow admitted vessels to make the neutral maritime belt and neutral ports the base of their naval operations against the enemy. The following rules may be formulated as emanating from this principle :—

(1) A neutral must, as far as is in his power, prevent belligerent men-of-war from cruising within his portion of the maritime belt for the purpose of capturing enemy vessels as soon as they leave this belt. It must, however, be specially observed that a neutral is not required to prevent this beyond his power. It is absolutely impossible to prevent such cruising under all circumstances and conditions, especially in the case of neutrals who own possessions in distant parts of the globe. How many thousands of vessels would, for instance, be necessary, if Great Britain were unconditionally obliged to prevent such cruising in every portion of the maritime belt of all her numerous possessions scattered over all parts of the globe?

(2) A neutral must prevent a belligerent man-of-war from leaving a neutral port at the same time as an enemy man-of-war or an enemy merchantman, or must make other arrangements which prevent an attack as soon as both reach the Open Sea.<sup>1</sup>

(3) A neutral must prevent a belligerent man-of-war, whose crew is reduced from any cause whatever, from enrolling sailors in his neutral ports, with the exception of such few hands as are necessary for the purpose of safely navigating the vessel to the nearest port of her home State.<sup>2</sup>

<sup>1</sup> See below, § 347.

<sup>2</sup> See above, § 33c.

(4) A neutral must prevent belligerent men-of-war admitted to his ports or maritime belt from taking in more provisions and coal than are necessary to bring them safely to the nearest port of their home State, for otherwise he would enable them to cruise on the Open Sea near his maritime belt for the purpose of attacking enemy vessels. And it must be specially observed that it matters not whether the man-of-war concerned intends to buy provisions and coal on land or to take them in from transport vessels which accompany or meet her in neutral waters.

(5) A neutral must prevent belligerent men-of-war admitted into his ports or maritime belt from replenishing with ammunition and armaments, and from adding to their armaments, as otherwise he would indirectly assist them in preparing for hostilities. And it matters not whether the ammunition and armaments are to come from the shore or are to be taken in from transport vessels.

(6) A neutral must prevent belligerent men-of-war admitted into his ports from remaining there longer than is necessary for ordinary and legitimate purposes.<sup>1</sup> It cannot be said that the rule adopted in 1862 by Great Britain, and followed by some other maritime States, not to allow a longer stay than twenty-four hours, is a rule of International Law. It is left to the consideration of neutrals to adopt any rule they think fit as long as the admitted men-of-war do not prolong their stay for any other than ordinary and legitimate purposes. But a neutral would certainly violate his duty of impartiality if he were to allow belligerent men-of-war to winter in his ports or to stay there for the

<sup>1</sup> See below, § 343.

purpose of waiting for other vessels of the fleet or transports.

This rule became of considerable importance during the Russo-Japanese War, when the Russian Baltic Fleet was on the way to the Far East. Admiral Rozhdestvensky is said to have stayed in the French territorial waters of Madagascar from December 1904 till March 1905, for the purpose of awaiting and joining there a part of the Baltic Fleet that had set out at a later date. The Press likewise reported a prolonged stay by parts of the Baltic Fleet during April 1905 at Kamranh Bay and Hon-kohe Bay in French Indo-China. Provided the reported facts be true, France would seem to have violated her duty of impartiality by not preventing such an abuse of her neutral ports.

Building  
and Fit-  
ting-out  
of Vessels  
intended  
for Naval  
Opera-  
tions.

§ 334. Whereas a neutral is in no<sup>1</sup> wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, it is now getting more and more generally recognised that his duty of impartiality requires him to prevent his subjects from building, fitting out, and arming to order of either belligerent vessels intended to be used as men-of-war or privateers. The difference between selling armed vessels to belligerents on the one hand, and building them to order on the other hand, is usually defined in the following way :

An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided she is not manned in a neutral port so that she can commit hostilities at once after having reached the Open Sea. A subject of a neutral who builds an armed ship, or arms a merchantman not

<sup>1</sup> See below, §§ 350 and 397.

to order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms intending to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a port of the belligerent. In the case of the "*La Santissima Trinidad*"<sup>1</sup> (1822), as in that of the "*Meteor*"<sup>2</sup> (1866), American courts have recognised this.<sup>3</sup>

On the other hand, if a subject of a neutral builds armed ships to order of a belligerent, he prepares the means of naval operations, since the ships on sailing outside the territorial waters of the neutral and taking in a crew and ammunition can at once commit hostilities. Thus, through carrying out the order of the belligerent, the neutral territory concerned has been made the base of naval operations. And as the duty of impartiality includes the obligation of the neutral to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war.

This distinction, although perhaps logically correct, is hair-splitting. It only shows the necessity that neutral States ought<sup>4</sup> to be required to prevent their subjects from supplying arms, ammunition, and the like, to belligerents. But so long as this progress is not made, the above distinction will probably continue to be drawn, in spite of its hair-splitting character.

<sup>1</sup> 7 Wheaton, § 340.

<sup>2</sup> See Wharton, III. § 396, p. 561.

<sup>3</sup> See Phillimore, III. § 151B, and Hall, § 224.

<sup>4</sup> See below, § 350.

The  
"Alabama,"  
Case, and  
the Three  
Rules of  
Washington.

§ 335. The movement for recognition of the fact that the duty of impartiality requires a neutral to prevent his subjects from building and fitting out to order of belligerents vessels intended for naval operations, began with the famous case of the "Alabama." It is not necessary to go into all the details<sup>1</sup> of this case. It suffices to say that in 1862, during the American Civil War, the attention of the British Government was drawn by the Government of the United States to the fact that a vessel was built in England to order of the insurgents for warlike purposes. This vessel, afterwards called the "Alabama," left Liverpool in July 1862 unarmed, but was met at the Azores by three other vessels, also coming from England, which supplied her with guns and ammunition, so that she could at once begin to prey upon the merchantmen of the United States. On the conclusion of the Civil War, the United States claimed damages from Great Britain for the losses sustained by her merchant marine through the operations of the "Alabama" and other vessels likewise built in England. Negotiations went on for several years, and finally the parties entered, on May 8, 1871, into the Treaty of Washington<sup>2</sup> for the purpose of having their difference settled by arbitration, five arbitrators to be nominated—one to be chosen by Great Britain, the United States, Brazil, Italy, and Switzerland. The treaty contained three rules, since then known as "The Three Rules of Washington," to be binding upon the arbitrators, namely:—

Two?

<sup>1</sup> See Mountague Bernard, *Neutrality of Great Britain during the American Civil War* (1870) pp. 338-496; Geffcken, *Die Alabama Frage* (1872); Pradier-

Fodéré, *La Question de l'Alabama* (1872); Caleb Cushing, *Le Traité de Washington* (1874); Bluntschli in R.I., II. (1870) pp. 452-485.

<sup>2</sup> Martens, N.R.G., XX. p. 698.

"A neutral Government is bound—

"*First.* To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a Power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction, to war-like use.

"*Secondly.* Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"*Thirdly.* To exercise due diligence in its waters, and as to all persons within its jurisdiction, to prevent any violations of the foregoing obligations and duties."

In consenting that these rules should be binding upon the arbitrators, Great Britain declared expressly that in spite of her consent she maintained that these rules were not recognised rules of International Law at the time when the case of the "Alabama" occurred, and the treaty contains also the stipulation that the parties—

"Agree to observe these rules as between themselves in future, and to bring them to the knowledge of other Maritime Powers, and to invite them to accede to them."

The appointed arbitrators met at Geneva in 1871, held thirty-two conferences there, and gave decision<sup>1</sup>

<sup>1</sup> The award is printed in its full extent in Phillimore, III. § 151, and Wharton, III. § 420A.

on September 14, 1872, according to which England had to pay 15,500,000 dollars damages to the United States.

The arbitrators put a construction upon the term *due diligence*<sup>1</sup> and asserted other opinions in their decision which are very much contested and to which Great Britain never consented. Thus, Great Britain and the United States, although they agreed upon the three rules, do not at all agree upon the interpretation thereof, and they could, therefore, likewise not agree upon the contents of the communication to other maritime States stipulated by the Treaty of Washington. It cannot, therefore, be said that the Three Rules of Washington have become general rules of International Law. Nevertheless, they were the starting-point of the movement for the general recognition of the fact that the duty of impartiality obliges neutrals to prevent their subjects from building and fitting out to order of belligerents vessels intended for warlike purposes.<sup>2</sup>

<sup>1</sup> See below, § 363.

<sup>2</sup> Attention must be drawn to the fact that the Institute of International Law in 1875, at its meeting at the Hague, adopted a

body of seven rules emanating from the Three Rules of Washington. See *Annuaire*, I. (1877) p. 139.

## IV

## NEUTRAL ASYLUM TO LAND FORCES AND WAR MATERIAL

Vattel, III. §§ 132-133—Hall, §§ 226 and 230—Halleck, II. p. 150—Taylor, § 621—Wharton, III. § 394—Bluntschli, §§ 774, 776-776A, 785—Heffter, § 149—Geffcken in Holtzendorff, IV. pp. 662-665—Ullmann, § 164—Bonfil, Nos. 1461-1462—Rivier, II, pp. 395-398—Calvo, IV. §§ 2668-2669—Fiore, III. Nos. 1576, 1582, 1583—Martens, II. § 133—Mérignac, pp. 370-376—Pillet, pp. 286-287—Kleen, II. §§ 151-157—Holland, War, Nos. 101-106—Hellborn, "Rechte und Pflichten der neutralen Staaten in Bezug auf die während des Krieges auf ihr Gebiet übertretenden Angehörigen einer Armee und das dorthingebrachte Kriegsmaterial der kriegführenden Parteien" (1888), pp. 12-83—Rolin-Jaequemyns in R.I., III. (1871), pp. 352-366.

§ 336. Neutral territory, being outside the region of war,<sup>1</sup> offers an asylum to members of belligerent forces, to the subjects of the belligerents and their property, and to war material of the belligerents. Since, according to the present rules of International Law, the duty of either belligerent to treat neutrals according to their impartiality must—the case of extreme necessity for self-preservation excepted—prevent them from violating the territorial supremacy of neutrals, enemy persons as well as enemy goods are perfectly safe on neutral territory. It is true that neither belligerent has a right to demand such asylum for his subjects, their property, and his State property from a neutral.<sup>2</sup> But he has, on the other hand, no right either to demand that a neutral refuse such asylum to the enemy. The territorial supremacy of the neutral enables him to

On  
Neutral  
Asylum in  
general.

<sup>1</sup> See above, §§ 70 and 71.

<sup>2</sup> The generally recognised usage for a neutral to grant temporary hospitality in his ports to vessels in distress of either belligerent is an exception to be discussed below in § 344.



use his discretion, and either to grant or to refuse asylum. However, the duty of impartiality incumbent upon him must induce a neutral granting asylum to take all such measures as are necessary to prevent his territory from being used as a base of hostile operations.

Now, neutral territory may be an asylum, first, for private enemy property; secondly, for public enemy property, especially war material, cash, and provisions; thirdly, for private subjects of the enemy; fourthly, for enemy land forces; and, fifthly, for enemy naval forces. Details, however, need only be given with regard to asylum to land forces, war material, and naval forces. For with regard to private property and private subjects it only needs mention that private war material brought into neutral territory stands on the same footing as public war material of a belligerent brought there, and, further, that private enemy subjects are safe on neutral territory even if they are claimed by a belligerent for the committal of war crimes.

Only asylum to land forces and war material will be discussed here in §§ 337-341, asylum to naval forces being reserved for a separate discussion in §§ 342-348. As regards asylum to land forces, a distinction must be made between (1) prisoners of war, (2) single fugitive soldiers, and (3) troops or whole armies pursued by the enemy and thereby induced to take refuge on neutral territory.

Neutral  
Territory  
and  
Prisoners  
of War.

§ 337. Neutral territory is an asylum to prisoners of war of either belligerent in so far as they become free *ipso facto* by their coming into neutral territory. And it matters not in which way they come there, whether they escape from a place of detention and take refuge on neutral territory, or whether they are

brought as prisoners into such territory by enemy troops who themselves take refuge there.<sup>1</sup>

The principle that prisoners of war regain their liberty by coming into neutral territory has been generally recognised for centuries. An illustration occurred in 1558, when several Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada which was wrecked near Calais, and, although the Spanish Ambassador claimed them, France considered them to be freed by the fact of their coming on her territory, and sent them to Constantinople.<sup>2</sup> But has the neutral on whose territory a prisoner has taken refuge the duty to retain such fugitives and thereby prevent them from rejoining the enemy army? In 1870, during the Franco-German War, Belgium, correctly I think, answered the question in the affirmative, and retained a French non-commissioned officer who had been a prisoner in Germany and had escaped into Belgian territory with the intention of rejoining at once the French forces. Whereas this case is controverted,<sup>3</sup> all writers agree that the case is different if escaped prisoners want to remain on the neutral territory. As such refugees may at any subsequent time wish to rejoin their forces, the neutral is by his duty of impartiality obliged to take adequate measures to prevent it. And the same is valid regarding prisoners who have been brought into neutral territory by enemy forces taking refuge there themselves. Although they are thereby free, they must be retained and comply with such measures as the neutral thinks necessary

<sup>1</sup> The case of prisoners on board a belligerent man-of-war which enters a neutral port is different; see below, § 345.

<sup>2</sup> See Hall, § 226, p. 641, note 1.

<sup>3</sup> The question is controverted; see Rolin-Jaequemyns in R.I., III. (1871), p. 556; Bluntschli, § 776; Heilborn, Rechte, pp. 32-34.

to prevent them from rejoining their forces.<sup>1</sup> Again, the case must be mentioned of prisoners being transported through neutral territory with the consent of the neutral. Such prisoners do not become free on entering neutral territory. But there is no doubt that the neutral, by consenting to the transport, violates his duty of impartiality, because such transport is equal to passage of troops through neutral territory. Attention must, lastly, be drawn to the case where enemy soldiers are amongst the wounded whom a belligerent is allowed by a neutral to transport through neutral territory. Such wounded prisoners become free, but they must, according to article 59 of the Hague Regulations, be guarded by the neutral so as to insure their not taking part again in the military operations.

Fugitive  
Soldiers  
on  
Neutral  
Territory.

§ 338. A neutral can grant asylum to single soldiers of belligerents who take refuge on his territory, although he need not do so and can at once send them back to the place they came from. If he grants such asylum, his duty of impartiality obliges him to disarm the fugitives and to take such measures as are necessary to prevent them from rejoining their forces. But it must be emphasised that it is practically impossible for a neutral to be so watchful as to detect every single fugitive who enters his territory. It will always happen that such fugitives steal into neutral territory and leave it again later on to rejoin their forces without the neutral being responsible. And a neutral must actually be in the position to retain such fugitives to incur responsibility for not doing so. Thus Luxemburg, during the Franco-

<sup>1</sup> This is, again, a moot case. cannot be retained by the neutral. Some writers—see, for instance, in case they intend at once to leave the neutral territory. Hailborn, *Rechte*, pp. 51-52—assert that such liberated prisoners

German War, could not prevent hundreds of French soldiers, who after the capitulation of Metz fled into her territory, from rejoining the French forces, because, according to the condition<sup>1</sup> of her neutralisation, she is not allowed to keep an army, and therefore, in contradistinction to Switzerland and Belgium, was unable to mobilise troops for the purpose of fulfilling her duty of impartiality.

§ 339. On occasions during war large bodies of troops, or even a whole army, are obliged to cross the neutral frontier for the purpose of escaping captivity. A neutral need not permit this, and can repulse them on the spot, but he can also grant asylum. It is, however, obvious that the presence of such troops on neutral territory is a danger for the other party. The duty of impartiality incumbent upon a neutral obliges him, therefore, to disarm such troops at once, and to guard them so as to insure their not again performing military acts during the war against the enemy. Article 57 of the Hague Regulations enacts now:—"A neutral who receives in his territory troops belonging to the belligerent armies shall detain them, if possible, at some distance from the theatre of war. He can keep them in camps, and even confine them in fortresses or localities assigned for the purpose. He shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorisation."

Neutral  
Territory  
and  
Fugitive  
Troops.

It is usual for troops who are not actually pursued by the enemy, so that they have no time for it, to enter through their commander into a convention with the representative of the neutral concerned, stipulating the conditions upon which they cross the

<sup>1</sup> See above, vol. I. § 100.

frontier and give themselves into the custody of the neutral. Such conventions are valid without needing ratification, provided they contain only such stipulations as do not disagree with International Law and as concern only the requirements of the case. Failing such a convention, article 58 of the Hague Convention enacts now that the neutral must supply the detained troops with food, clothing, and relief required by humanity, the expenses to be paid by the home State at the conclusion of the war.

It must be specially observed that, although the detained troops are not prisoners of war captured by the neutral, they are nevertheless in his custody, and therefore under his disciplinary power, just as prisoners of war are under the disciplinary power of the State which keeps them in captivity. They do not enjoy the extritoriality—see above, vol. I. § 445—due to armed forces abroad because they are disarmed. As the neutral is required to prevent them from escaping, he must apply stern measures, and he can punish severely every member of the detained force who attempts to frustrate such measures or does not comply with the disciplinary rules regarding order, sanitation, and the like.

The most remarkable instance known in history is the asylum granted during the Franco-German War by Switzerland to a French army of 85,000 men with 10,000 horses crossing the frontier on February 1, 1871.<sup>1</sup> France had, after the conclusion of the war, to pay about eleven million francs for the maintenance of this army in Switzerland during the rest of the war.

<sup>1</sup> See the Convention regarding General Clinchant in Martens, this asylum between the Swiss N.R.G., XIX. p. 639. General Herzog and the French

§ 340. The duty of impartiality incumbent upon a neutral obliges him to detain in the same way as soldiers such non-combatant<sup>1</sup> members of belligerent forces as cross his frontier. He can, however, not retain army surgeons and other non-combatants who are privileged according to article 2 of the Geneva Convention.

Neutral  
Territory  
and Non-  
combatant  
Members  
of Belligerent  
Forces.

§ 341. It happens during war that war material belonging to one of the belligerents is brought into neutral territory for the purpose of saving it from capture by the enemy. Such war material may be brought by troops crossing the neutral frontier for the purpose of evading captivity, or it may be purposely sent there by order of a commander. Now, a neutral is not at all obliged to admit such material, just as he is not obliged to admit soldiers of belligerents. But if he admits it, his duty of impartiality obliges him to seize and detain it till after the conclusion of peace. War material includes, besides arms, ammunition, provisions, horses, means of military transport such as carts and the like, and everything else that belongs to the equipment of troops. But means of military transport belong to war material only so far as they are the property of a belligerent. If they are hired or requisitioned from private individuals, they cannot be detained by the neutral.

Neutral  
Territory  
and War  
Material  
of Belligerents.

It likewise happens during war that war material originally the property of one of the belligerents but seized and appropriated by the enemy is brought by the latter into neutral territory. Does such material, through coming into neutral territory, become free, and must it be restored to its original owner, or must it be retained by the neutral and after the war

<sup>1</sup> See Heilborn, Rechte, pp. 43-46.

be restored to the belligerent who brought it into the neutral territory? In analogy with prisoners of war who become free through being brought into neutral territory, it is maintained<sup>1</sup> that such war material becomes free and must be restored to its original owner. To this, however, I cannot agree. Since war material becomes through seizure by the enemy his property and remains his property unless the other party re-seizes and thereby re-appropriates it, there is no reason for its falling back into the property of its original owner upon transportation into neutral territory.<sup>2</sup>

## V

### NEUTRAL ASYLUM TO NAVAL FORCES

Vattel, III. § 132—Hall, § 231—Twiss, II. § 222—Halleck, II. p. 151—Taylor, §§ 635, 636, 640—Wharton, III. § 394—Wheaton, § 434—Bluntschli, §§ 775-776a—Heffter, § 149—Geffcken in Holtzendorff, IV. pp. 665-667, 674—Ullmann, § 164—Bonfils, No. 1463—Rivier, II. p. 405—Calvo, IV. §§ 2669-2684—Fiore, III. Nos. 1576-1581, 1584—Martens, II. § 133—Kleen, II. § 155—Pillet, pp. 305-307—Perels, § 39, p. 231—Testa, pp. 173-187—Dupuis, Nos. 308-314—Ortolan, II. pp. 247-291—Hautefeuille, I. pp. 344-405—Bajer in R.I., 2nd ser., II. (1900), pp. 242-244—Lapradelle in R.G., XI. (1904), p. 531.

Asylum  
to Naval  
Forces in  
Contra-  
distinc-  
tion to  
Asylum  
to Land  
Forces.

§ 342. Whereas asylum granted to land forces and single members of them by a neutral is conditioned by the obligation of the neutral to disarm such forces and to detain them for the purpose of preventing them from partaking in further military operations, a neutral can grant asylum to men-of-war of belli-

<sup>1</sup> See Hall, § 226.

<sup>2</sup> See Heilborn, *Rechte*, p. 60. Heilborn (pp. 61-65) also discusses the question whether a neutral can claim a lien over war

material brought into his territory for expenses incurred for the maintenance of detained troops belonging to the owner of the war material.

gerents without being obliged to disarm and detain them.<sup>1</sup> The reason is that the sea is considered an international highway, that the ports of all nations serve more or less the interests of international traffic on the sea, and that the conditions of navigation make a certain hospitality of ports to vessels of all nations a necessity. Thus the rules of International Law regarding asylum of neutral ports to men-of-war of belligerents have developed on somewhat different lines from the rules regarding asylum to land forces. But the rule, that the duty of impartiality incumbent upon a neutral must prevent him from allowing belligerents to use his territory as a base of operations of war, is nevertheless valid regarding asylum granted to their men-of-war.

§ 343. Although a neutral can grant asylum to belligerent men-of-war in his ports, he has no duty to do so. He can prohibit all belligerent men-of-war from entering all his ports, whether these vessels are pursued by the enemy or desire to enter for other reasons. However, his duty of impartiality must prevent him from denying to the one party what he grants to the other. And he can, therefore, not allow entry to men-of-war of one belligerent without giving the same permission to men-of-war of the other belligerent. Neutrals as a rule admit men-of-war of both parties, but they frequently exclude all men-of-war of both parties from entering certain ports. Thus Austria prohibited during the Crimean War all belligerent men-of-war from entering the port of Cattaro. Thus, further, Great Britain prohibited during the American Civil War the access of all

Neutral  
Asylum  
to Naval  
Forces  
Optional.

<sup>1</sup> See, however, below, § 347, concerning the abuse of asylum, which must be prohibited.



belligerent men-of-war to the ports of the Bahama Islands, the case of stress of weather excepted.

That, although a neutral is not prevented from granting asylum to belligerent men-of-war, they can be allowed to remain for a short time only in neutral ports will be remembered. For it was stated above in § 333 (6) that his duty of impartiality must prevent a neutral from allowing belligerent men-of-war to be stationed in neutral ports.

Asylum  
to Naval  
Forces in  
Distress.

§ 344. To the rule that a neutral need not admit men-of-war of the belligerents to neutral ports there is no exception in strict law. However, there is an international usage that belligerent men-of-war in distress should never be prevented from making for the nearest port. In accordance with this usage vessels in distress have always been allowed entry even to such neutral ports as were totally closed to belligerent men-of-war. There are even instances known of belligerent men-of-war in distress having asked for and been granted asylum by the enemy in an enemy port.<sup>1</sup>

Exterri-  
toriality  
of Men-  
of-War  
during  
Asylum.

§ 345. The exterritoriality, which according to a universally recognised rule of International Law men-of-war must enjoy<sup>2</sup> in foreign ports, obtains even in time of war during their stay in neutral ports. Therefore, prisoners of war on board do not become free by coming into the neutral territory<sup>3</sup> as long as they are not on shore, nor do prizes brought into neutral ports by belligerents. On the other hand, belligerent men-of-war are expected to comply with all orders which the neutral makes for the purpose of preventing them from making his ports the base of their operations of war, as, for instance, with the order

<sup>1</sup> See above, § 189.

<sup>2</sup> See above, vol. I. § 450.

<sup>3</sup> See above, § 337.

not to leave the ports at the same time as vessels of the other belligerent. And if they do not comply voluntarily, they can be made to do it through application of force, for a neutral has the duty to prevent by all means at hand the abuse of the asylum granted.

In case—see below, § 347 (3 and 4)—a vessel is granted an asylum for the whole time of the war, and is, therefore, dismantled, she loses the character of a man-of-war, no longer enjoys the privilege of exterritoriality—see above, vol. I. § 450—due to men-of-war in foreign waters, and prisoners on board become free, although they must be detained by the neutral concerned.

§ 346. A belligerent man-of-war, to which asylum is granted in a neutral port, is not only not disarmed and detained, but facilities may even be rendered to her as regards slight repairs, and the supply of provisions and coal. However, a neutral may only allow small repairs of the vessel herself and not of her armaments;<sup>1</sup> for he would render assistance to one of the belligerents, to the detriment of the other, if he were to allow the damaged armaments of a belligerent man-of-war to be repaired in a neutral port. And, further, a neutral may only allow such an amount of provisions and coal to a belligerent man-of-war in neutral ports as is necessary for her safe navigation to the nearest port of her home State;<sup>2</sup> for, if he did otherwise, he would allow the belligerent to use the neutral ports as a base for operations of war. And, lastly, a neutral may allow a belligerent man-of-war in neutral ports to enrol only so small a number of sailors as is necessary to navigate her safely to the nearest port of her home State.<sup>3</sup>

Facilities  
to Men-  
of-War  
during  
Asylum.

<sup>1</sup> See above, § 333 (5), and below, § 347 (3).

<sup>2</sup> See above, § 333 (4).

<sup>3</sup> See above, §§ 330 and 333 (3).

Abuse of  
Asylum to  
be pro-  
hibited.

§ 347. It would be easy for belligerent men-of-war to which asylum is granted in neutral ports to abuse it if the neutrals were not required to prohibit such abuse.

(1) A belligerent man-of-war may first abuse asylum by ascertaining whether and what kind of enemy vessels are in the same neutral port, accompanying them when they leave, and attacking them immediately they reach the Open Sea. To prevent such abuse, several neutral States in the eighteenth century made an arrangement that, if belligerent men-of-war or privateers met with enemy vessels in the same neutral port, they were not to be allowed to leave together, but an interval of twenty-four hours must elapse between the sailing of the vessels. During the nineteenth century the so-called twenty-four hours' rule has been enforced by the majority of States. As International Law stands at present, and as the duty of impartiality incumbent upon neutrals is now looked upon, a neutral would certainly be considered to have violated this duty if he regularly allowed the simultaneous sailing of belligerent men-of-war and enemy vessels from his ports, with the consequence that the latter are captured by the former as soon as they reach the Open Sea. On the other hand, however, it cannot be asserted that the twenty-four hours' rule is a rule of International Law, and that every neutral has to enforce it. For nothing prevents a neutral from making other arrangements for the purpose of avoiding an abuse of asylum on the part of belligerent men-of-war; for instance, making the commanders promise not to attack any enemy vessels starting simultaneously with themselves.<sup>1</sup>

<sup>1</sup> See above, § 333 (2), and Hall, § 231, p. 651.

(2) Asylum may, secondly, be abused for the purpose of waiting for other vessels of the same fleet, of wintering in a port, and the like. It seems to be beyond doubt that neutrals must prohibit this abuse by ordering such belligerent men-of-war to leave the neutral ports. Several maritime States, following the example started by Great Britain in 1862,<sup>1</sup> adopted the rule not to allow a belligerent man-of-war to stay in their neutral ports for longer than twenty-four hours,<sup>2</sup> except in the case of stress of weather and the like. Other States, such as France, do not object to a more prolonged stay of belligerent men-of-war in their ports, but they ought certainly not to allow them to abuse the asylum.

(3) Asylum may, thirdly, be abused for the purpose of repairing a belligerent man-of-war which has become unseaworthy. Although—as was stated above in § 346—small repairs are allowed, a neutral would violate his duty of impartiality by allowing repairs making good the unseaworthiness of a belligerent man-of-war. During the Russo-Japanese War this was generally recognised, and the Russian men-of-war “Askold” and “Grossovoi” in Shanghai, the “Diana” in Saigon, and the “Lena” in San Francisco had therefore to be disarmed and detained. The crews of these vessels had likewise to be detained for the time of the war.

(4) Asylum may, lastly, be abused for the purpose of escaping from attack and capture. Neutral territorial waters are in fact an asylum for men-of-war which are pursued by the enemy, but, since nowadays a right of pursuit into neutral waters, as asserted by Bynkershoek,<sup>3</sup> is no longer recognised,

<sup>1</sup> See Hall, § 231, p. 653.

<sup>2</sup> See above, § 333 (6).

<sup>3</sup> *Quaest. jur. publ.* I. c. 8. See also above, § 288, p. 306.

it would be an abuse of asylum if the escaped vessel could make a prolonged stay in the neutral waters. A neutral who would allow such abuse of asylum would violate his duty of impartiality, for he would assist one of the belligerents to the disadvantage of the other.<sup>1</sup> Therefore, when after the battle off Port Arthur in August 1904 the Russian battleship "Cesarewitch," the cruiser "Novik," and three destroyers escaped, and took refuge in the German port of Tsing-Tau in Kiao-Chau, the "Novik," which was uninjured, had to leave the port after a few hours,<sup>2</sup> whereas the other vessels, which were too damaged to leave the port, were disarmed and, together with their crews, detained till the conclusion of peace. And when, at the end of May 1905, after the battle of Tsu Shima, three injured Russian men-of-war, the "Aurora," "Oleg," and "Jemchug," escaped into the harbour of Manila, the United States of America ordered them to be disarmed and, together with their crews, to be detained during the war.

<sup>1</sup> It was only during the Russo-Japanese War in 1904 that this was generally recognised. Up to that event it was still a controverted question whether a neutral is obliged either to disarm or to disarm and detain such men-of-war as had fled into his ports for the purpose of escaping attack and capture. See Hall, § 231, p. 651, and Perels, § 39, p. 213, in contradistinction to Fiore, III. No. 1578. The "Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers," adopted by the Institute of International Law in 1898 at its meeting at the Hague—see *Annuaire*, XVII. (1898), p. 273—answers (article 42) the question in the affirmative.

<sup>2</sup> This case marks the difference between the duties of neutrals as regards asylum to land and naval forces. Whereas land forces crossing neutral frontiers must either be at once repulsed or retained, men-of-war can be granted the right to stay for some limited time within neutral harbours and to leave afterwards unhindered; see above, § 342. The supply of a small quantity of coal to the "Novik" in Tsing-Tau was criticised by writers in the Press, but unjustly. For—see above, § 346—a neutral can allow a belligerent man-of-war in his port to take in so much coal as is necessary to navigate her to her nearest home port.

§ 348. It happens during war that neutral men-of-war pick up and save from drowning the soldiers and sailors of belligerent men-of-war sunk by the enemy, or that they take belligerent marines on board for other reasons. Such neutral men-of-war being an asylum for the rescued marines, the question has arisen whether such rescued marines must be given up to the enemy, or must be retained during the war, or can be brought to their home country. In analogy with the case where a neutral admits soldiers or war material of the belligerents into his territory,<sup>1</sup> the rule ought to be that such rescued marines must be detained during the war. Two cases are on record which illustrate this matter.

Neutral  
Men-of-  
war as an  
Asylum.

(1) At the beginning of the Chino-Japanese War, on July 25, 1894, after the Japanese cruiser "Naniwa" had sunk the British ship "Kowching," which served as transport carrying Chinese troops,<sup>2</sup> forty-five Chinese soldiers who clung to the mast of the sinking ship were rescued by the French gunboat "Lion" and brought to the Korean harbour of Chemulpo. Hundreds of others saved themselves on some islands near the spot where the incident occurred, and 120 of these were taken in by the German man-of-war "Iltis" and brought back to the Chinese port of Tientsin.<sup>3</sup>

(2) At the beginning of the Russo-Japanese War, on February 9, 1904, after the Russian cruisers "Variag" and "Koriets" had accepted the challenge<sup>4</sup> of a Japanese fleet, fought a battle outside the harbour of Chemulpo, and returned, crowded with wounded, to Chemulpo, the British cruiser "Talbot"

<sup>1</sup> See above, §§ 338-341.

<sup>2</sup> See above, § 88.

<sup>3</sup> See Takahaashi, Cases on International Law during the

Chino-Japanese War (1899), pp. 36 and 51.

<sup>4</sup> See above, § 320 (1).

the American "Vicksburg," the French "Pascal," and the Italian "Elba" received large numbers of the crews of the disabled Russian cruisers. The Japanese demanded that the neutral ships should give up the rescued men as prisoners of war, but the neutral commanders demurred, and an arrangement was made according to which the rescued men were handed over to the Russians under the condition that they should not take part in hostilities during the war.<sup>1</sup>

## VI

### SUPPLIES AND LOANS TO BELLIGERENTS

Vattel, III. § 110—Hall, §§ 216-217—Lawrence, § 254—Phillimore, III. § 151—Twiss, II. § 227—Halleck, II. p. 163—Taylor, §§ 622-625—Walker, § 67—Wharton, III. §§ 390-391—Bluntschli, §§ 765-768—Heffter, § 148—Geffcken in Holtzendorff, IV. pp. 687-700—Ullmann, §§ 164-165—Bonfils, Nos. 1471-1474—Rivier, II. pp. 385-411—Calvo, IV. §§ 2624-2630—Fiore, III. Nos. 1559-1563—Martens, II. § 134—Kleen, I. §§ 66-69, 96-97—Mérignhac, pp. 360-364—Pillet, pp. 289-293—Dupuis, Nos. 317-319.

Supply on  
the part of  
Neutrals.

§ 349. The duty of impartiality must prevent a neutral from supplying belligerents with arms, ammunition, vessels,<sup>2</sup> and military provisions. And it matters not whether such supply takes place for money or gratuitously. A neutral who sells arms and ammunition to a belligerent at a profit violates his duty of impartiality as well as another who transfers such arms and ammunition to a belligerent as a present. This is generally recognised in theory and practice as far as direct transactions regarding such supply between belligerents and neutrals are

<sup>1</sup> See Lawrence, War, pp. 63-75. the sale of vessels by German steam-ship companies to Russia during the Russo-Japanese War.

<sup>2</sup> See above, § 321, concerning

concerned. Different, however, is the case where a neutral does not directly and knowingly deal with a belligerent, although he may, or ought to, be aware that indirectly he is supplying a belligerent. Different States have during neutrality taken up a different attitude regarding this case. Thus in 1825, during the War of Independence which the Spanish South American Colonies waged against their mother country, the Swedish Government sold three old men-of-war, the "Försigtigheten," "Euridice," and "Camille" to two merchants, who on their part sold them to English merchants, representatives of the Government of the Mexican insurgents. When Spain complained, Sweden rescinded the contract.<sup>1</sup> Further, the British Government in 1863, during the American Civil War, after selling an old gunboat, the "Victor," to a private purchaser and subsequently finding that the agents of the Confederate States had got hold of her, gave the order that during the war no more Government ships should be sold.<sup>2</sup> On the other hand, the Government of the United States of America, in pursuance of an Act passed by Congress in 1868 for the sale of arms which the end of the Civil War had rendered superfluous, sold in 1870, notwithstanding the Franco-German War, thousands of arms and other war material which were shipped to France.<sup>3</sup>

§ 350. In contradistinction to supply to belligerents by neutrals, such supply by subjects of neutrals is lawful, and neutrals are, therefore, not obliged according to their duty of impartiality to prevent such supply. Consequently, when in August 1870, during the Franco-German War, Germany

Supply on  
the part of  
Subjects  
of  
Neutrals.

<sup>1</sup> See Martens, *Causes Célèbres*,  
V. pp. 229-254.

<sup>2</sup> See Lawrence, § 254.

<sup>3</sup> See Wharton, III. § 391.



lodged complaints with the British Government for not prohibiting its subjects from supplying arms and ammunition to the French Government, Great Britain correctly replied that she was by International Law not under the obligation to prevent her subjects from committing such acts. Of course, such neutral as is anxious to avoid all controversy and friction may by his Municipal Law order his subjects to abstain from such acts, as for instance Switzerland and Belgium did during the Franco-German War. But such injunctions arise from political prudence, and not from any obligation imposed by International Law. The endeavour to make a distinction between supply in single cases and on a small scale on the one hand, and, on the other, supply on a large scale, and to consider only the former lawful,<sup>1</sup> has neither in theory nor in practice found recognition. As International Law stands, belligerents can make use of visit, search, and seizure to protect themselves against conveyance of contraband by sea to the enemy by subjects of neutrals. But as far as their neutral home State is concerned, such subjects can, at the risk of having their property seized during such conveyance, supply either belligerent with any amount of arms, ammunition, coals, provisions, and even with armed ships,<sup>2</sup> provided always that they deal with the belligerents in the ordinary way of commerce. The case is different if there is no ordinary commerce with a belligerent Government and if subjects of neutrals supply directly a belligerent army or navy, or parts of them. If, for instance, a belligerent fleet is cruising outside the maritime belt of a neutral,

<sup>1</sup> See Bluntschli, § 766.

<sup>2</sup> See above, § 334, and below, § 397.

the latter must prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to that fleet, for otherwise he would allow the belligerent to make use of neutral resources for naval operations.<sup>1</sup> But he need not prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to belligerent ports, although the supply is destined for the navy and the army of the belligerent. He need not prevent belligerent merchantmen from coming into his ports and carrying arms and the like bought from his subjects over to the ports of their home State. And he need not prevent vessels of his subjects from following a belligerent fleet and supplying it *en route*<sup>2</sup> with coal, ammunition, provisions, and the like, provided such supply does not take place in the neutral maritime belt.

There is no doubt that, as the law stands at present, neutrals need not prevent their subjects from supplying belligerents with arms and ammunition. Yet there is, on the other hand, no doubt either that such supply is apt to prolong a war which otherwise would come to an end at an earlier date. But it will take a long time, if ever, before it will be made a duty for neutrals to prevent such supply as far as is in their power, and to punish such of their subjects as engage in it. The profit derived from such supply being enormous, the members of the Family of Nations are not inclined to cripple the trade of their subjects by preventing it. And belligerents want to have the opportunity of replenishing with arms and ammunition if they run short of them during war. The question is merely one of the standard of public morality.<sup>3</sup> If this standard

<sup>1</sup> See above, § 333 (4).

<sup>2</sup> See above, § 311, p. 331, note 1.

<sup>3</sup> See above, vol. I. § 51 (5), p. 75.

risers, and it becomes the conviction of the world at large that supply of arms and ammunition by subjects of neutrals is apt to lengthen wars, the rule will appear that neutrals must prevent such supply.

Loans and  
Subsidies  
on the  
part of  
Neutrals.

§ 351. His duty of impartiality must prevent a neutral from granting a loan to either belligerent. Vattel's (III. § 110) distinction between whether such loans are granted on interest or not, and his assertion that loans on the part of neutrals are lawful if they are granted on interest with the pure intention of making money, have not found favour with other writers. Nor do I know any instance of such loan on interest having occurred during the nineteenth century.

What is valid regarding a loan is all the more valid regarding subsidies in money granted to a belligerent on the part of a neutral. Through the granting of subsidies a neutral becomes the ally of the belligerent in a similar way as by furnishing him with a number of troops.<sup>1</sup>

Loans and  
Subsidies  
on the  
part of  
Subjects  
of  
Neutrals.

§ 352. It is a moot point in the theory of International Law whether a neutral is obliged by his duty of impartiality to prevent his subjects from granting subsidies and loans to belligerents for the purpose of enabling them to continue the war. Several writers<sup>2</sup> maintain either that a neutral is obliged to prevent such loans and subsidies altogether, or at least that

<sup>1</sup> See above, §§ 305, 306, 321.

<sup>2</sup> See Phillimore, III. § 151; Bluntschli, § 768; Heffter, § 148; Kleen, I. § 68. The case of *De Witt v. Hendricks* (9 Moore, 586) quoted by Phillimore in support of his assertion that neutrals must prevent their subjects from subscribing for a loan for belligerents, is not decisive, for Lord Chief

Justice Best only declared "that it was contrary to the Law of Nations for persons residing in this country to enter into any agreements to raise money by way of a loan for the purpose of *supporting subjects of a foreign State in arms against a Government in alliance with our own.*"

he must prohibit a public subscription on neutral territory for such loans and subsidies. On the other hand, the number of writers is constantly growing who maintain that, since money is just as much an article of commerce as goods, a neutral is in no wise obliged to prevent on his territory public subscription on the part of his subjects for loans to the belligerents. In contradistinction to the theory of International Law, the practice of the States has beyond doubt established the fact that neutrals need not prevent the subscription for loans to belligerents on their territory. Thus in 1854, during the Crimean War, France in vain protested against a Russian loan being brought out in Amsterdam, Berlin, and Hamburg. In 1870, during the Franco-German War, a French loan was brought out in London. In 1877, during the Russo-Turkish War, no neutral prevented his subjects from subscribing for the Russian loan. Again, in 1904, during the Russo-Japanese War, Japanese loans came out in London and Berlin, and Russian loans in Paris and Berlin.

But matters differ in regard to subsidies to belligerents on the part of subjects of neutrals. A neutral is indeed not obliged to prevent individual subjects from granting subsidies to belligerents, just as he is not obliged to prevent them from enlisting with either belligerent. But if he were to allow on his territory a public appeal for subscriptions for such subsidy, he would certainly violate his duty of impartiality; for loans are a matter of commerce, subsidies are not. It must, however, be emphasised that public appeals for subscriptions of money for charitable purposes in favour of the wounded, the prisoners, and the like, need not be prevented, even

if they are only made in favour of one of the belligerents.

The distinction between loans and subsidies is certainly correct as the law stands at present. But there is no doubt that the fact of the belligerents having the opportunity of getting loans from subjects of neutrals is apt to lengthen wars. The Russo-Japanese War, for instance, would have come to an end much sooner if neither belligerent could have borrowed money from subjects of neutrals. Therefore, what has been said above in § 350 with regard to the supply of arms and ammunition on the part of subjects of neutrals applies likewise to loans: they will no longer be considered lawful when the standard of public morality rises.

## VII

### SERVICES TO BELLIGERENTS

Ullmann, § 165—Rivier, II. pp. 388—391—Calvo, IV. §§ 2640—2641—Martens, II. § 134—Perels, § 43—Kleen, I. §§ 103—108—Lawrence, War, pp. 83—92, 218—220—Scholz, ‘‘ Drahtlose Telegraphie und Neutralität ’’ (1905) *passim*, and ‘‘ Krieg und Seekabel ’’ (1904), pp. 122—133—Kebedgy, in R.I., 2nd ser. IV (1904), pp. 445—451.

**Pilotage.** § 353. Since pilots are in the service of riparian States, neutrals are obliged by their duty of impartiality to prevent their pilots from piloting belligerent men-of-war and belligerent transport vessels. This does not, however, apply to piloting such vessels into neutral ports in case asylum is granted them, and through the maritime belt in case their passage is not prohibited, but only to piloting on the Open Sea, with the further excep-

tion of vessels in distress for the purpose of saving them from being lost. Accordingly, Great Britain prohibited her pilots, during the Franco-German War in 1870, from conducting German and French men-of-war outside the maritime belt, the case of vessels in distress excepted.

§ 354. It is generally recognised that the duty of impartiality incumbent upon a neutral obliges him to prevent his men-of-war and other public vessels from rendering transport services to either belligerent. Therefore, such vessels must carry neither soldiers nor sailors belonging to belligerent forces, nor their prisoners of war, nor ammunition, military or naval provisions, nor despatches. The question how far such vessels are prevented from carrying enemy subjects other than members of the forces depends upon the question whether by carrying those individuals they render such service to one of the belligerents as is detrimental to the other. Thus, when the Dutch Government in 1901, during the South African War, intended to offer a man-of-war to President Kruger for the purpose of conveying him to Europe, they made sure in advance that Great Britain did not object.

Transport  
on the  
part of  
Neutrals.

§ 355. Just as a neutral is not obliged to prevent his merchantmen from carrying contraband, so he is not obliged to prevent them from rendering services to belligerents by carrying in the way of trade enemy troops, and the like, and enemy despatches. Neutral merchantmen rendering such services to belligerents do this at their own risk, since such services are analogous to carrying contraband, for which belligerents can punish the merchantmen by capturing them,<sup>1</sup> but for which the neutral

Transport  
on the  
part of  
Neutral  
Merchant-  
men.

<sup>1</sup> See below, §§ 407-413.

State under whose flag such merchantmen sail has to bear no responsibility whatever.

Informa-  
tion  
regarding  
Military  
and Naval  
Opera-  
tions.

§ 356. Distinction must be made between information on the part of vessels, by couriers, by telegraph or telephone, and by wireless telegraphy.

(1) It is obvious that the duty of impartiality incumbent upon a neutral obliges him to prevent his men-of-war from giving any information to a belligerent concerning naval operations of the other party. But a neutral bears no responsibility whatever for private vessels sailing under his flag which give such information. Such vessels run, however, the risk of being captured and confiscated, and their crews may eventually be punished as war criminals for espionage.

(2) It is likewise obvious that his duty of impartiality must prevent a neutral from giving information concerning the war to a belligerent through his diplomatic envoys, couriers, and the like. But the question has been raised whether a neutral is obliged to prevent couriers<sup>1</sup> carrying despatches from a belligerent over his neutral territory. I believe the answer must be in the negative, at least as far as those couriers in the service of diplomatic envoys and such agents are concerned who carry despatches from a State to its head or to diplomatic envoys abroad. Since they enjoy—as stated above, vol. I. §§ 405 and 457—inviolability for their persons and official papers, a neutral cannot interfere and find out whether these individuals carry information to the disadvantage of the enemy.

(3) It is a moot point whether a neutral is obliged by his duty of impartiality to prevent belligerents from making use of telegraphs, submarine cables,

<sup>1</sup> See Calvo, IV. § 2640.

and telephones on his territory.<sup>1</sup> As State telegrams are as a rule transmitted in cipher, there is no possibility of controlling them, and it will hardly be possible to maintain that a neutral ought not to admit State telegrams in cipher despatched by belligerents. Messages sent by telephone are controllable, and so are telegrams in ordinary language. But it cannot be said that there is as yet a generally recognised duty of neutrals to control telephone messages and telegrams in ordinary language so as to be able to prevent information to belligerents.<sup>2</sup>

The case is different when a belligerent intends to arrange the transmitting of messages through a submarine cable purposely laid over neutral territory, or through telegraph and telephone wires purposely erected on neutral territory. This would seem to be an abuse of neutral territory, and the neutral must prevent it. Accordingly, when in 1870, during the Franco-German War, France intended to lay a telegraph cable from Dunkirk to the North of France, the cable to go across the Channel to England and from there back to France, Great Britain refused her consent on account of her neutrality. And again in 1898, during war between Spain and the United States of America, when the latter intended to land at Hong Kong a cable proposed to be laid from Manila, Great Britain refused her consent.<sup>3</sup>

(4) During the Russo-Japanese War, in 1904, the question arose whether a neutral can allow his territory to be used for the purpose of wireless

<sup>1</sup> See Scholz, *l.c.*, pp. 7-11, and Calvo, IV. §§ 2640-2641.

<sup>2</sup> See, however, the rule 5, adopted by the Institute of International Law—see above, § 214—concerning submarine telegraph cables in time of war:—"Il est

entendu que la liberté de l'état neutre de transmettre des dépêches n'implique pas la faculté d'en user ou d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants."

<sup>3</sup> See Lawrence, War, p. 219.



telegraphy in the interest or the service of belligerents, for during the siege of Port Arthur the Russians installed an apparatus for wireless telegraphy in Chifu and communicated thereby with the besieged.<sup>1</sup> The opinion would seem to be general that a neutral must prevent such an abuse of his territory.

On the other hand, a neutral is certainly not obliged to prevent his subjects from giving information to belligerents by way of wireless telegraphy, an apparatus being installed on a neutral merchantman. Such individuals run, however, the risk of being punished as spies, provided they act clandestinely or under false pretences,<sup>2</sup> and the vessel concerned runs the risk of being captured and confiscated.

It must be specially observed that newspaper correspondents making use of wireless telegraphy from on board of neutral merchantmen for the purpose of sending news to their papers,<sup>3</sup> cannot be treated as spies, and the merchantmen concerned cannot be confiscated, although belligerents need by no means allow<sup>4</sup> the presence of such vessels at the theatre of war. Of course, an individual may be at the same time a correspondent for a neutral paper and a spy, and he may then be punished.

<sup>1</sup> See Lawrence, War, p. 218.

<sup>2</sup> See above, § 160.

<sup>3</sup> See Lawrence, War, pp. 84-88.

<sup>4</sup> Thus during the Russo-Japanese War the "Haimun," a

vessel fitted up with a wireless telegraphy apparatus for the service of the "Times," was ordered away by the Japanese.

# VIII

## VIOLATION OF NEUTRALITY

Hall, §§ 227-229—Lawrence, §§ 252 and 258—Phillimore, III. §§ 151A-151B—Taylor, §§ 630 and 642—Wharton, III. §§ 402, 402A—Wheaton, §§ 429-433—Bluntschli, §§ 778-782—Heffter, § 146—Geffcken in Holtzendorff, IV. pp. 667-676, 700-709—Ullmann, § 164—Bonfilis, No. 1476—Rivier, II. pp. 394-395—Calvo, IV. §§ 2654-2666—Fiore, III. Nos. 1567-1570—Martens, II. § 138—Kleen, I. § 25—Dupuis, Nos. 332-337.

§ 357. Many writers who speak of violation of neutrality treat under this head only of violations of the duty of impartiality incumbent upon neutrals. And indeed such violations only are meant, if one speaks of violation of neutrality in the narrower sense of the term. However, it is necessary for obvious reasons to discuss not only violations of the duty of impartiality of neutrals, but violations of all duties deriving from neutrality, whether they are incumbent upon neutrals or upon belligerents. In the wider sense of the term violation of neutrality comprises, therefore, every performance or omission of an act contrary to the duty of a neutral towards either belligerent as well as contrary to the duty of either belligerent towards a neutral. Everywhere in this treatise the term is used in its wider sense.

Violation of Neutrality in the narrower and in the wider sense of the Term.

§ 358. Violation of neutrality must not be confounded with the ending of neutrality,<sup>1</sup> for neither a violation on the part of a neutral<sup>2</sup> nor a violation on the part of a belligerent brings *ipso facto* neutrality to an end. If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent

Violation in contradistinction to End of Neutrality.

<sup>1</sup> See above, § 312.

<sup>2</sup> But this is almost everywhere asserted, as the distinction between the violation of the duty of

impartiality incumbent upon neutrals on the one hand, and, on the other, the ending of neutrality, is usually not made.

in spite of a violation of neutrality. It must be emphasised that a violation of neutrality contains nothing more than a breach of a duty deriving from the condition of neutrality. This applies not only to violations of neutrality by negligence, but also to those by intention. Even if the worst comes to the worst and the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party. For there is no violation of neutrality so great as to oblige the offended party to make war in answer to it, such party having always the choice whether it will keep up the condition of neutrality or not.

But this applies only to mere violations of neutrality, and not to hostilities. The latter are acts of war and bring neutrality to an end; they have been characterised in contradistinction to mere violations above in § 320.

Consequences of Violations of Neutrality.

§ 359. Violations of neutrality, whether committed by a neutral against a belligerent or by a belligerent against a neutral, are international delinquencies.<sup>1</sup> They may at once be repulsed, the offended party can require the offender to make reparation, and, if this is refused, it can take such measures as it thinks adequate to exact the necessary reparation.<sup>2</sup> If the violation is trivial, the offended State will often overlook it, or merely complain. If, on the other hand, the violation is very substantial and grave, the offended State will perhaps at once declare that it considers itself at war with the offender. In such case it is not the violation of neutrality which brings neutrality to an end, but the declaration of the

<sup>1</sup> See above, vol. I. § 151.

<sup>2</sup> See above, vol. I. § 156.

offended State that it considers the violation of so grave a character as to oblige it to regard itself as at war with the offender. That a violation of neutrality can only, like any other international delinquency, be committed by malice or culpable negligence,<sup>1</sup> and that it may be committed through a State's refusing to comply with the consequences of its "vicarious" responsibility for acts of its agents or subjects,<sup>2</sup> is a matter of course. Thus, if a belligerent fleet attacks enemy vessels in neutral territorial waters without an order from its Government, the latter bears "vicarious" responsibility for this violation of neutral territory on the part of its fleet. This "vicarious" responsibility turns into "original" responsibility, for a case of violation of neutrality and an international delinquency arise, if the Government concerned refuses to disown the act of its fleet and to make the necessary reparation. And the analogous is valid if an agent of a neutral State without an order of his Government commits such an act as would constitute a violation of neutrality in case it were ordered by the Government; for instance, if the head of a province of a neutral, without thereto being authorised by his Government, allows forces of a belligerent to march through this neutral territory.

§ 360. It is totally within the discretion of a belligerent whether he will acquiesce in a violation of neutrality committed by a neutral in favour of the other belligerent. On the other hand, however, a neutral cannot exercise the same discretion regarding a violation of neutrality committed by one belligerent and detrimental to the other party. His duty of impartiality rather obliges him in the first instance to

Neutrals  
not to ac-  
quiesce in  
Violations  
of Neu-  
trality  
committed  
by a Belligerent.

<sup>1</sup> See above, vol. I. § 154.

<sup>2</sup> See above, vol. I. § 150.

prevent, as far as is in his power, the belligerent concerned from committing such violation; for instance, to repulse an attack of men-of-war of a belligerent on enemy vessels in neutral ports. And in case he could not prevent and repulse a violation of his neutrality, the same duty obliges him to exact due reparation from the offender.<sup>1</sup> For otherwise he would favour the one party to the detriment of the other. If a neutral neglects this obligation, he is thereby committing a violation of neutrality on his part for which he may be made responsible by such belligerent as has suffered through the violation of neutrality committed by the other belligerent and acquiesced in by the neutral. For instance, if belligerent men-of-war seize enemy vessels in ports of a neutral, and if the neutral, who could not or did not prevent this, exacts no reparation from the belligerent concerned, the other party can make the neutral responsible for the losses sustained.

Case of the  
"General  
Arm-  
strong."

§ 361. Some writers<sup>2</sup> maintain that a neutral is freed from responsibility for a violation of neutrality through a belligerent attacking enemy forces in neutral territory, in case the attacked forces, instead of trusting for protection or redress to the neutral, defend themselves against the attack. This rule is

<sup>1</sup> This duty is nowadays generally recognised, but before the nineteenth century it did not exist, although the rule was well recognised that belligerents must not commit hostilities on neutral territory, and in especial in neutral ports and waters. That in spite of its recognition this rule was in the eighteenth century frequently not obeyed by commanders of belligerent fleets, can be illustrated by many cases. Thus, for instance, in 1793,

the French frigate "Modeste" was captured in the harbour of Genoa by two British men-of-war (see Hall, § 220). And in 1801, during war against Sweden, a British frigate captured the "Freden" and three other Swedish vessels in the Norwegian harbour of Oster-Risoer (see Ortolan, II. pp. 413-418.)

<sup>2</sup> See, for instance, Hall, § 228, and Geffcken in Holtzendorff, IV. p. 701.

adopted from the arbitral award in the case of the "General Armstrong." In 1814, during war between Great Britain and the United States of America, the American privateer "General Armstrong," lying in the harbour of Fayal, an island belonging to the Portuguese Azores, defended herself against an attack of an English squadron, but was nevertheless captured. The United States claimed damages from Portugal because the privateer was captured in a neutral Portuguese port. Negotiations went on for many years, and the parties finally agreed in 1851 upon arbitration to be given by Louis Napoleon, then President of the French Republic. In 1852 Napoleon gave his award in favour of Portugal, maintaining that, although the attack on the privateer in neutral waters comprised a violation of neutrality, Portugal could not be made responsible, on account of the fact that the attacked privateer chose to defend herself instead of demanding protection from the Portuguese authorities.<sup>1</sup> It is, however, not at all certain that the rule laid down in this award will find general recognition in theory and practice.<sup>2</sup>

§ 362. It is obvious that the duty of a neutral not to acquiesce in violations of neutrality committed by one belligerent to the detriment of the other obliges him to repair, so far as he can, the result of such wrongful acts. Thus, he must liberate a prize taken in his neutral waters, or prisoners made on his territory, and the like. In so far, however, as he cannot, or not sufficiently, undo the wrong done, he must exact

Mode of  
exact-  
ing  
Repa-  
ration  
from Bel-  
ligerents  
for Viola-  
tions of  
Neu-  
trality.

<sup>1</sup> See Calvo, IV. § 2662, and Dana's note 208 in Wheaton, § 429.

<sup>2</sup> The case of the "Reshitelni," which occurred in 1904, during the Russo-Japanese War, and is somewhat similar to that of the

"General Armstrong," is discussed above in § 320 (2). That no violation of neutrality took place in the case of the "Variag" and "Koriets," is shown above in § 320 (1).

reparation from the offender. Now, no general rule can be laid down regarding the mode of exacting such reparation, since everything depends upon the merits of the individual case. Only as regards capture of enemy vessels in neutral waters a practice has grown up, which must be considered binding, and according to which the neutral must claim the prize, and eventually damages, from the belligerent concerned, and must restore her to the other party. Thus in 1800, during war between Great Britain and the Netherlands, Prussia claimed before the British Prize Court the "Twee Gebroeders,"<sup>1</sup> a Dutch vessel captured by the British cruiser "L'Espiègle" in the neutral maritime belt of Prussia. Sir William Scott ordered restoration of the vessel, yet he refused costs and damages, because the captor had not intentionally violated Prussian neutrality but only by mistake and misapprehension. Thus again, in 1805, during war between Great Britain and Spain, the United States claimed before the British Prize Court the "Anna,"<sup>2</sup> a Spanish vessel captured by the English privateer "Minerva" within their neutral maritime belt. Thus, further, in 1864, during the American Civil War, when the Confederate cruiser "Florida" was captured by the Federal cruiser "Wachusset" in the neutral Brazilian port of Bahia, Brazil claimed the prize. As the latter had sunk while at anchor in Hampton Roads, she could not be restored, but the United States disowned the violation of neutrality committed by her cruiser by court-martialling the commander; further, by dismissing her Consul at Bahia for having advised the capture; and, finally, by sending a man-of-war to the spot where the violation of neutrality had taken place for the special

<sup>1</sup> 3 Rob. 162.

<sup>2</sup> 5 Rob. 373. See above, vol. I. § 234.

purpose of delivering a solemn salute to the Brazilian flag.<sup>1</sup>

§ 363. Apart from intentional violations of neutrality, a neutral can be made responsible only for such acts favouring or damaging a belligerent as he could have prevented with due diligence, and has been culpably negligent in his omission to prevent. It is by no means the obligation of a neutral to prevent such acts under all circumstances and conditions. This is in fact impossible, and it becomes all the more impossible the larger a neutral State and its boundary lines are. As long as a neutral exercises due diligence for the purpose of preventing such acts, he is not responsible in case they are nevertheless performed. However, the term *due diligence* has become controversial through the definition proffered by the United States of America in interpreting the Three Rules of Washington, and through the Geneva Court of Arbitration adopting such interpretation.<sup>2</sup> According to this interpretation the *due diligence* of a neutral must be in proportion to the risks to which either belligerent may be exposed from a failure to fulfil the obligations of neutrality on his part. If this interpretation were generally recognised, oppressive obligations would be incumbent upon the neutrals. However, the fact is that this interpretation is neither in theory nor in practice generally recognised. *Due diligence* in International Law can have no other meaning than what it has in Municipal Law. It means *such diligence as can reasonably be expected if all the circumstances and conditions of the case are taken into consideration.*

Negligence on the part of Neutrals.

<sup>1</sup> See Wharton, I. § 27.

<sup>2</sup> See above, § 335.



## IX

## RIGHT OF ANGARY

Hall, § 278—Lawrence, § 252—Phillimore, III. § 29—Halleck, I. p. 485—Taylor, § 641—Walker, § 69—Bluntschli, § 795A—Heffter, § 150—Bulmerincq in Holtzendorff, IV. pp. 98–103—Geffcken in Holtzendorff, IV. pp. 771–773—Bonfile, No. 1440—Rivier, II. pp. 327–329—Kleen, II. §§ 165 and 230—Holland, War, No. 24—Perels, § 40—Hautefeuille, III. pp. 416–426.

The Obsolete Right of Angary.

§ 364. Under the term *jus angariae*<sup>1</sup> many writers on International Law place the right, often claimed and practised in former times, of a belligerent deficient in vessels to lay an *embargo* on and seize neutral merchantmen in his harbours, and to compel them and their crews to transport troops, ammunition, and provisions to certain places on payment of freight in advance.<sup>2</sup> This practice arose in the Middle Ages, and was made much use of by Louis XIV. of France. To save the vessels of their subjects from seizure under the right of angary, States began in the seventeenth century to conclude treaties by which they renounced such right with regard to each other's vessels. Thereby the right came into disuse during the eighteenth century. Many writers<sup>3</sup> assert, nevertheless, that it is not obsolete, and might be exercised even to-day. But I doubt whether the Powers would concede to one another the exercise of such a right. The fact that no case happened in the nineteenth century and that International Law with regard to rights and duties of neutrals has become much more developed

<sup>1</sup> The term *angaria*, which in medieval Latin means *post-station*, is a derivation from the Greek term *ἀγγαρος* for messenger. *Jus angariae* would therefore literally mean a right of

transport.

<sup>2</sup> See above, §§ 40 and 102.

<sup>3</sup> See, for instance, Phillimore III. § 29; Calvo, III. § 1277; Heffter, § 150; Perels, § 40.

during the eighteenth and nineteenth centuries, would seem to justify the opinion that such angary is now obsolete.<sup>1</sup>

§ 365. In contradistinction to this obsolete right to compel neutral ships and their crews to render certain services, the modern right of angary consists in the right of belligerents to make use of, or destroy in case of necessity, for the purpose of offence and defence, neutral property on their own or on enemy territory or on the Open Sea. If property of subjects of neutral States is vested with enemy character,<sup>2</sup> it is not neutral property in the strict sense of the term neutral, and all rules respecting appropriation, utilisation, and destruction of enemy property obviously apply to it. The object of the right of angary is such property of subjects of neutral States as retains its neutral character from its temporary position on belligerent territory and which therefore is not vested with enemy character. All sorts of neutral property, whether it consists of vessels or other<sup>3</sup> means of transport, or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided the articles concerned are serviceable to military ends and wants. The conditions under which the right can be exercised are the same as those under which private enemy property can be utilised or destroyed, but in every case the neutral owner must be fully indemnified.<sup>4</sup>

The  
Modern  
Right of  
Angary.

<sup>1</sup> See Article 39 of the "Règlement sur le régime légal des navires . . . dans les ports étrangers" adopted by the Institute of International Law (Annuaire, XVII. 1898, p. 272): "Le droit d'angarie est supprimé, soit en temps de paix, soit en temps de guerre, quant aux navires neutres."

<sup>2</sup> See above, § 92.

<sup>3</sup> Thus in 1870, during the Franco-German War, the Germans seized hundreds of Swiss and Austrian railway carriages in France and made use of them for military purposes.

<sup>4</sup> See article 6 of U.S. Naval War Code:—"If military necessity should require it, neutral vessels

A remarkable case happened in 1871 during the Franco-German War. The Germans seized some British coal-vessels lying in the river Seine at Duclair, and sank them for the purpose of preventing French gunboats from running up the river. On the intervention of the British Government, Count Bismarck refused to recognise the duty of Germany to indemnify the owners of the sunk vessels, although he agreed to make indemnification.

However, it may safely be maintained that a duty to pay indemnities for any damage done by exercising the right of angary must nowadays be recognised, since articles 52 and 53 of the Hague Regulations stipulate the payment of indemnities for the utilisation of private enemy railway plant, vessels, telephones, telegraphs, arms, and all kinds of war material, and, further, the payment, or at least the giving of a receipt, for requisitions. If, thus, the immunity of private enemy property is recognised, that of private neutral property must certainly be recognised also.

It should be mentioned that article 54 of the Hague Regulations, enacting "the plant of railways coming from neutral States, whether the property of these States, or of companies, or of private persons, shall be sent back as soon as possible," indirectly recognises the right of angary, since it does not prohibit the use of neutral plant, but only requests it to be sent back as soon as possible. And that eventually indemnities must be paid for it, follows

found within the limits of belligerent authority may be seized and destroyed, or otherwise used for military purposes, but in such cases the owners of the neutral vessels must be fully recompensed. The amount of the indemnity

should, if practicable, be agreed upon in advance with the owner or master of the vessel; due regard must be had for treaty stipulations upon these matters." See also, Holland, War, No. 24.

indirectly out of the second part of article 53 of the Hague Regulations.

§ 366. Whatever the extent of the right of angary may be, it does not derive from the law of neutrality. The correlative duty of a belligerent to indemnify the neutral owner of property appropriated or destroyed by the exercise of the right of angary does indeed derive from the law of neutrality. But the right of angary itself is rather a right deriving from the law of war. As a rule this law gives, under certain circumstances and conditions, the right to a belligerent to appropriate enemy property only, but under other circumstances and conditions, and exceptionally, it likewise gives a belligerent the right to appropriate and destroy neutral property.

Right of  
Angary  
not deriv-  
ing from  
Neutrality.

§ 367. Those Continental writers who do not recognise the existence of so-called conditional contraband maintain that, according to the right of angary, every belligerent has a right to stop all such neutral vessels as carry provisions and other goods with a hostile destination, and to seize such goods on payment of indemnities. The point will be discussed below in § 406.

Pre-emp-  
tion of  
Neutral  
Goods  
according  
to Right  
of Angary.

## CHAPTER III

### BLOCKADE

#### I

#### CONCEPTION OF BLOCKADE

Grotius, III. c. 1, § 5—Bynkershoek, *Quaest. jur. publ.* I. c. 2-15—Vattel, III. § 117—Hall, §§ 233, 237-266—Lawrence, §§ 269-276—Maine, pp. 107-109—Manning, pp. 400-412—Phillimore, III. §§ 285-321—Twiss, II. §§ 98-120—Halleck, II. pp. 182-213—Taylor, §§ 674-684—Walker, §§ 76-82—Wharton, III. §§ 359-365—Wheaton, §§ 509-523—Bluntschli, §§ 827-840—Heffter, §§ 154-157—Geffcken in Holtzendorff, IV. pp. 738-771—Ullmann, § 154—Bonfils, Nos. 1608-1659—Despagnet, Nos. 617-637—Pradier-Fodéré, VI. Nos. 2676-2679—Rivier, II. pp. 288-298—Calvo, V. §§ 2827-2908—Fiore, III. Nos. 1606-1629—Martens, II. § 124—Pillet, pp. 129-144—Kleen, I. §§ 124-139—Ortolan, II. pp. 292-336—Hautefeuille, II. pp. 189-288—Gesner, pp. 145-227—Perels, §§ 48-51—Testa, pp. 221-229—Dupuis, Nos. 159-198—Boeck, Nos. 670-726—Holland, *Prize Law*, §§ 106-140—U.S. Naval War Code, articles 37-43—Bargrave Deane, "The Law of Blockade" (1870)—Fauchille, "Du blocus maritime" (1882)—Carnazza-Amari, "Del blocco marittimo" (1897)—Frémont, "De la saisie des navires en cas de blocus" (1899)—Guynot-Boissière, "Du blocus maritime" (1899)—§§ 35-44 of the "Règlement international des prises maritimes" (Annuaire, IX. 1887, p. 218) adopted by the Institute of International Law.

Definition  
of  
Blockade.

§ 368. Blockade is the blocking of the approach to the enemy coast or a part of it by men-of-war<sup>1</sup> for

<sup>1</sup> When in 1861, during the American Civil War, the Federal Government blocked the harbour of Charleston by sinking ships laden with stone, the question arose whether a so-called stone-blockade is lawful. There ought to be no doubt—see below, § 380—that such a stone-blockade is not a blockade in the ordinary sense of the term, and that neutral ships cannot be seized and confiscated for having attempted egress or ingress. But, on the

the purpose of preventing ingress and egress of vessels of all nations. Through blockading a coast a belligerent endeavours to intercept all intercourse, and especially commercial intercourse, by sea between the coast and the world at large. Although blockade is, as shown above in §§ 173 and 174, a means of warfare against the enemy, it concerns neutrals as well, because the ingress and egress of neutral vessels are thereby interdicted and may be punished.

Blockade in the modern sense of the term is an institution which could not develop<sup>1</sup> before neutrality was in some form a recognised institution of the Law of Nations, and before the freedom of neutral commerce was in some form guaranteed. But it took several hundred years for the institution of blockade to reach its present condition, since, until the beginning of the nineteenth century, belligerents frequently made use of so-called paper blockades, which are no longer valid, a blockade now being binding only if effective.

It is on account of the practical importance of blockade for the interests of neutrals that the matter is more conveniently treated together with neutrality than together with war. And it must be emphasised that blockade as a means of warfare must not be confounded with so-called pacific blockade, which is a means of compulsive settlement of State differences.

§ 369. A blockade is termed strategic if it forms part of other military operations directed against the coast which is blockaded, or if it is declared in order

Blockade  
strategic  
and com-  
mercial.

other hand, there ought to be no doubt either that this mode of obstructing an enemy port is as lawful as any other means of sea warfare, provided the blocking of the harbour is made known so that neutral vessels can avoid the

danger of being wrecked. See Wharton, III. § 361A; Fauchille, *Blocus*, pp. 143-145; Perels, § 35, p. 187.

<sup>1</sup> It dates from the end of the sixteenth century; see Fauchille, *Blocus*, pp. 2-6.

to cut off supply to enemy forces on shore. In contradistinction to blockade strategic, one speaks of a commercial blockade, when a blockade is declared simply in order to cut off the coast from intercourse with the outside world, although no military operations take place on shore. That blockades commercial are, according to the present rules of International Law, as legitimate as blockades strategic, is generally not denied. But several writers <sup>1</sup> maintain that blockades purely commercial ought to be abolished as not in accordance with the guaranteed freedom of neutral commerce during war.

Blockade  
to be  
Universal.

§ 370. A blockade is really in being when vessels of all nations are interdicted and prevented from egress or ingress. Blockade as a means of warfare is admissible only in the form of a *universal* blockade. If the blockading belligerent were to allow the ingress or egress of vessels of one nation, no blockade would exist.<sup>2</sup>

On the other hand, provided a blockade is universal, a special licence of ingress or egress may be given to a special vessel and for a particular purpose, and men-of-war of all neutral nations may be allowed to pass to and fro unhindered. Thus, when during the American Civil War the Federal Government blockaded the coast of the Confederate States, neutral men-of-war were not prevented from ingress and egress. But it must be specially observed that a belligerent has a right to prevent neutral men-of-war from passing through the line of blockade, and it is totally within his discretion whether or not he will admit or exclude such men-of-war.

§ 371. As a rule a blockade is declared for the

<sup>1</sup> See Hall, § 233.

Franciska, Spinks, 287. See also

<sup>2</sup> The Rolla, 6 Rob. 364; the below, § 382.

purpose of preventing ingress as well as egress. But sometimes only the egress or only the ingress is prevented. In such cases one speaks of "Blockade outwards" and of "Blockade inwards" respectively. Thus the blockade of the mouth of the Danube declared by the Allies in 1854 during the Crimean War was a "blockade inwards," since the only purpose was to prevent supply of the Russian Army from the sea.<sup>1</sup>

Blockade  
Outwards  
and  
Inwards

§ 372. It is sometimes asserted<sup>2</sup> that only ports, or even only fortified ports, can be blockaded, but the practice of the States shows that single ports and portions of an enemy coast as well as the whole of the enemy coast can be blockaded. Thus during the American Civil War the whole of the coast of the Confederate States to the extent of about 2,500 nautical miles was blockaded. And it must be specially observed that such ports of a belligerent as are in the hands of the enemy may be the object of a blockade. Thus during the Franco-German War the French blockaded<sup>3</sup> their own ports of Rouen, Dieppe, and Fécamp, which were occupied by the Germans.

What  
Places  
can be  
Block-  
aded.

§ 373. It is a moot question whether the mouth of a so-called international river may be the object of a blockade, in case not all the riparian States are belligerents. Thus, when in 1854, during the Crimean War, the allied fleets of Great Britain and France blockaded the mouth of the Danube, Bavaria and Würtemberg, which remained neutral, protested. When in 1870 the French blockaded the whole of the German coast of the North Sea, they exempted

Blockade  
of Inter-  
national  
Rivers.

<sup>1</sup> The Gerasimo, 11 Moore, P.C. 88.

<sup>2</sup> Napoleon I. maintained in his Berlin Decrees: "Le droit de

blocus, d'après la raison et l'usage de tous les peuples policés, n'est applicable qu'aux places fortes."

<sup>3</sup> See Fauchille, Blocus, p. 161.



the mouth of the river Ems, because it runs partly through Holland. And when in 1863, during the blockade of the coast of the Confederate States, the Federal cruiser "Vanderbilt" captured the British vessel "Peterhoff"<sup>1</sup> destined for Matamoras, on the Mexican shore of the Rio Grande, the American Courts released the vessel on the ground that trade with Mexico, which was neutral, could not be prohibited.

Justifica-  
tion of  
Blockade.

§ 374. The question has been raised in what way blockade, which vests a belligerent with a certain jurisdiction over neutral vessels and which has detrimental consequences for neutral trade, could be justified.<sup>2</sup> Several writers, following Hautefeuille,<sup>3</sup> maintain that the establishment of a blockade by a belligerent stationing a number of men-of-war so as to block the approach to the coast includes conquest of that part of the sea, and that such conquest justifies a belligerent in prohibiting ingress and egress of vessels of all nations. In contradistinction to this artificial construction of a conquest of a part of the sea, some writers<sup>4</sup> try to justify blockade by the necessity of war. I think, however, no special justification of blockade is necessary at all. The fact is that the detrimental consequences of blockade for neutrals stand in the same category as the many other detrimental consequences of war for neutrals. Neither the one nor the other need be specially justified. A blockade interferes indeed with the recognised principle of the freedom of the sea, and, further, with the recognised freedom of neutral commerce.

<sup>1</sup> 5 Wallace, 49. See Fauchille, 13-36.

Blocus, pp. 171-183; Phillimore, III. § 293 A; Hall, § 266; Rivier, II. p. 291.

<sup>3</sup> See Hautefeuille, II. pp. 190-191.

<sup>4</sup> See Gessner, p. 151; Bluntschli, § 827; Martens, II. § 124.

<sup>2</sup> The matter is thoroughly treated by Fauchille, Blocus, pp.

But all three have developed together, and when the freedom of the sea in time of peace and war, and, further, when the freedom of neutral commerce became generally recognised, the exceptional restrictions of blockade became at the same time recognised as legitimate.

## II

### ESTABLISHMENT OF BLOCKADE

See the literature quoted above at the commencement of § 368.

§ 375. A declaration of blockade being “a high<sup>1</sup> act of sovereignty” and having far-reaching consequences upon neutral trade, it is generally recognised not to be in the discretion of a commander to establish blockade without the authority of his Government. Such authority may be granted purposely for a particular blockade, the Government ordering the commander of a squadron to blockade a certain port or coast. Or a Government may expressly delegate its power to blockade to a commander for use at his discretion. And if operations of war take place at great distance<sup>2</sup> from the seat of Government and a commander finds it necessary to establish a blockade, the latter may become valid through his Government giving its immediate consent after being informed of the act of the commander. And, further, the powers vested in the hands of the supreme commander of a fleet are supposed to include the authority to establish a blockade in case he finds it necessary, provided that his Government acquiesces as soon as it is informed of the establishment of the blockade.<sup>3</sup>

Competence to establish Blockade.

<sup>1</sup> The *Henrik and Maria*, 1 Rob. 146.

<sup>2</sup> The *Rolla*, 6 Rob. 364.

<sup>3</sup> As regards the whole matter, see Fauchille, Blokus, pp. 68-73.

Notifica-  
tion of  
Blockade.

§ 376. A blockade is not in being *ipso facto* by the outbreak of war. And even the actual blocking of the approach to an enemy coast by belligerent men-of-war need not by itself mean that the ingress and egress of *neutral* vessels are to be prohibited, since it may take place for the purpose of preventing the egress and ingress of *enemy* vessels only. Continental writers consider, therefore, notification essential for the establishment of a blockade. English, American, and Japanese writers, however, do not hold notification essential, although they consider knowledge of the existing blockade on the part of a neutral vessel to be necessary for her condemnation for breach of blockade.<sup>1</sup>

But although they hold notification essential for the establishment of blockade, Continental writers differ with regard to the kind of notification that is necessary. Some writers<sup>2</sup> maintain that three different notifications must take place—namely, first, a local notification to the authorities of the blockaded ports or coast; secondly, a diplomatic or general notification to all maritime neutral States by the blockading belligerent; and, thirdly, a special notification to every approaching neutral vessel. Other writers<sup>3</sup> consider only diplomatic and special notification essential. Again others<sup>4</sup> maintain that special notification to every approaching neutral vessel is alone required, although they recommend diplomatic notification as a matter of courtesy.

As regards the practice of States, it is usual for the commander establishing a blockade to send a

<sup>1</sup> See below, § 384.

Gessner, p. 181.

<sup>2</sup> See, for instance, Kleen, I. § 131.

<sup>4</sup> See, for instance, Hautefeuille, II. pp. 224 and 226; Calvo, V. § 2846; Fauchille, pp. 219-221.

<sup>3</sup> See, for instance, Bluntschli, §§ 831-832; Martens, II. § 124,

declaration of blockade to the authorities of the blockaded ports or coast and the foreign consuls there. It is, further, usual for the blockading Government to notify the fact diplomatically to all neutral maritime States. And some States, as France and Italy, order their blockading men-of-war to board every approaching neutral vessel and notify her of the establishment of the blockade. But Great Britain, the United States of America, and Japan do not consider notification essential for the institution of a blockade. They hold the simple fact alone that the approach is blocked, and the egress and ingress of neutral vessels are actually prevented, to be sufficient to make the existence of a blockade known, and, when no diplomatic notification has taken place, they do not seize a vessel for breach of blockade whose master had no actual notice of the existence of the blockade. English,<sup>1</sup> American,<sup>2</sup> and Japanese<sup>3</sup> practice, accordingly, makes a distinction between a so-called *de facto* blockade on the one hand, and, on the other, a notified blockade.

§ 377. As regards ingress, a blockade becomes valid from the moment it is established; even vessels in ballast have no right of ingress. But as regards egress, it is usual for the blockading commander to grant a certain space of time within which neutral vessels may leave the blockaded ports unhindered. No rule exists respecting the extent of such space of time, but fifteen days are usually granted.<sup>4</sup>

Space of  
Time for  
Egress of  
Neutral  
Vessels.

§ 378. Apart from the conclusion of peace, a blockade can come to an end in three different ways.

End of  
Blockade.

<sup>1</sup> The *Vrouw Judith*, 1 Rob. article 30.  
150.

<sup>2</sup> See U.S. Naval War Code, War Code, article 43, thirty days are allowed "unless otherwise

<sup>3</sup> See Japanese Prize Law, specially ordered."

It may, first, be raised by the blockading State for any reason it likes, and in this case it is usual to notify the end of blockade to all neutral maritime States. A blockade may, secondly, come to an end through an enemy force driving off the blockading squadron or fleet. In such case the blockade ends *ipso facto* by the blockading squadron being driven away, whatever their intention to return may be. Should the squadron return and resume the blockade, it must be considered as new, and not simply the continuation of the former blockade. The third ground for the ending of a blockade is its failure for any reason to be effective, a point which will be treated below in § 382.

### III

#### EFFECTIVENESS OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Effective  
in Contra-  
distinc-  
tion to  
Fictitious  
Blockade.

§ 379. The necessity of effectiveness in a blockade by means of the presence of a blockading squadron of sufficient strength to prevent egress and ingress of vessels became gradually recognised during the first half of the nineteenth century, and it became formally enacted as a principle of the Law of Nations through the Declaration of Paris in 1856. Effective blockade is the contrast to so-called fictitious or paper blockade, which was frequently practised during the seventeenth, eighteenth, and at the beginning of the nineteenth century.<sup>1</sup> Fictitious blockade consists in the declaration and notification that a port or a coast is blockaded without, however, posting a sufficient

<sup>1</sup> See Fauchille, *Blocus*, pp. 74-109.

number of men-of-war on the spot to be really able to prevent egress and ingress of every vessel. It was one of the principles of the First and the Second Armed Neutrality that a blockade should always be effective, but it was not till after the Napoleonic wars that this principle gradually found general recognition. Nowadays such States as have not acceded to the Declaration of Paris nevertheless do not dissent regarding the necessity of effectiveness of blockade.

§ 380. The condition of effectiveness of blockade, as defined by the Declaration of Paris, is its maintenance "by such a force as is sufficient really to prevent access to the coast." But no unanimity exists respecting the requirements of an effective blockade according to this definition. Apart from differences of opinion regarding points of minor interest, it may be stated that in the main there are two conflicting opinions.

Condition  
of Effect-  
iveness of  
Blockade.

According to the one opinion the definition of an effective blockade already pronounced by the First Armed Neutrality of 1780 is valid, and a blockade is effective only when the approach to the coast is barred by a chain of men-of-war anchored on the spot and so near to one another that the line cannot be passed without obvious danger to the passing vessel.<sup>1</sup> This corresponds to the practice of France.

According to the other opinion, a blockade is effective when the approach is watched—to use the words of Dr. Lushington<sup>2</sup>—"by a force sufficient to render

<sup>1</sup> See Hautefeuille, II. p. 194; Gessner, p. 179; Kleen, I. § 129; Boeck, Nos. 676-681; Dupuis, Nos. 173-174; Fauchille, Blocus, pp. 110-142. Phillimore, III. § 293 takes up the same standpoint in so far as a blockade *de facto* is concerned:—"A blockade *de facto* should be effected by stationing a

number of ships, and forming as it were an arch of circumvallation round the mouth of the prohibited port, where, if the arch fails in any one part, the blockade itself fails altogether."

<sup>2</sup> In his judgment in the case of the *Franciaka*, Spinks, 287.

the egress and ingress dangerous, or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable." According to this opinion there need be no chain of anchored men-of-war to expose any vessels attempting to break the blockade to a cross fire, but a real danger of capture suffices, whether the danger is caused by cruising or anchored men-of-war. This is the standpoint of theory and practice of Great Britain and the United States, and it seems likewise to be that of Germany and several German writers.<sup>1</sup> The blockade during the American War of the whole coast of the Confederate States of the extent of 2,500 nautical miles by four hundred Federal cruisers could, of course, only be maintained by cruising vessels; and the fact that all neutral maritime States recognised it as effective shows that the opinion of dissenting writers has more theoretical than practical importance.

The real danger to passing vessels being the characteristic of effectiveness of blockade, it must be recognised that in certain cases and in the absence of a sufficient number of men-of-war a blockade may be made effective through planting land batteries within range of any vessel attempting to pass.<sup>2</sup> But a stone blockade, so called because vessels laden with stones are sunk in the channel to block the approach—see above, § 368, note 1—is not an effective blockade.

And it must, lastly, be mentioned that the distance of the blockading men-of-war from the blockaded

<sup>1</sup> See Perels, § 49; Bluntschli, § 829; Liszt, § 41, IV.

<sup>2</sup> The Nancy, 1 Acton, 63; the Circassian, 2 Wallace, 135; the Olinda Rodrigues, 174, United

States, 510. See also Bluntschli, § 829; Perels, § 49; Geffcken in Holtzendorff, IV. p. 750; Walker, Manual, § 78.

port or coast is immaterial, as long as the circumstances and conditions of the special case justify such distance. Thus during the Crimean War the port of Riga was blockaded by a man-of-war stationed at a distance of 120 miles from the town in the Lyser Ort, a channel three miles wide forming the only approach to the gulf.<sup>1</sup>

§ 381. It is impossible to state exactly what amount of danger to a vessel attempting to pass is necessary to prove an effective blockade. It is recognised that a blockade does not cease to be effective in case now and then a vessel succeeds in passing the line unhindered, provided there was so much danger as to make her capture probable. Dr. Lushington strikingly dealt with the matter in the following words:<sup>2</sup>—"The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a port. Nothing is further from my intention, nor indeed more opposed to my notions, than any relaxation of the rule that a blockade must be sufficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence, I believe that in every case the inquiry has been, whether the force was competent and present, and, if so, the performance of the duty was presumed; and I think I may safely assert that in no case was a blockade held to be void, when the blockading force was on the spot or near thereto, on the ground of

Amount  
of Danger  
which  
creates  
Effective-  
ness.

<sup>1</sup> The *Franciska*, Spinks, 287.      <sup>2</sup> In his judgment in the case See Hall, § 260, and Holland, of the *Franciska*, Spinks, 287. Studies, pp. 166-167.



vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron."

Cessation  
of Effect-  
iveness.

§ 382. A blockade is effective so long as the danger lasts which makes probable the capture of such vessels as attempt to pass the approach. A blockade, therefore, ceases *ipso facto* by the absence of such danger, whether the blockading men-of-war are driven away, or are sent away for the fulfilment of some task which has nothing to do with the blockade, or voluntarily withdraw, or allow the passage of vessels in other cases than those which are exceptionally admissible. Thus, when in 1861, during the American Civil War, the Federal cruiser "Niagara," which blockaded Charleston, was sent away and her place was taken after five days by the "Minnesota," the blockade ceased to be effective, although the Federal Government refused to recognise this.<sup>1</sup> Thus, further, when during the Crimean War Great Britain allowed Russian vessels to export goods from blockaded ports, and accordingly the egress of such vessels from the blockaded port of Riga was permitted, the blockade of Riga ceased to be effective, because it tried to interfere with neutral commerce only; the capture of the Danish vessel "Franciska"<sup>2</sup> for attempting to break the blockade was, therefore, not upheld.

On the other hand, practice<sup>3</sup> and the majority of writers recognise the fact that a blockade does not cease to be effective in case the blockading force is driven away for a short time through stress of weather. English<sup>4</sup> writers, further, deny that a blockade loses effectiveness through a blockading

<sup>1</sup> See Mountague Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 237-239.

<sup>2</sup> Spinks, 287. See above, § 370.

<sup>3</sup> *The Columbia*, 1 Rob. 154.

<sup>4</sup> See Twiss, II. § 103, p. 201, and Phillimore, III. § 294.

man-of-war being absent for a short time for the purpose of chasing a vessel which succeeded in passing the approach unhindered.<sup>1</sup>

#### IV

#### BREACH OF BLOCKADE

See the literature quoted above at the commencement of § 368.

§ 383. Breach or violation of blockade is the un-  
 allowed ingress or egress of a vessel in spite of the  
 blockade. The attempted breach is, as far as punish-  
 ment is concerned, treated in the same way as the  
 consummated breach, but the practice of States differs  
 with regard to the question at what time and by  
 what act an attempt to break a blockade commences.

Definition  
 of Breach  
 of  
 Blockade.

But it must be specially observed that the blockade-  
 runner violates International Law as little as the  
 contraband carrier. Both (see below, § 398) violate  
 injunctions of the belligerent concerned.

§ 384. Since breach of blockade is, from the stand-  
 point of the blockading belligerent, a criminal act,  
 knowledge on the part of a vessel of the existence of  
 a blockade is essential for making her egress or  
 ingress a breach of blockade. It is for this reason  
 that Continental theory and practice do not consider  
 a blockade established without local and diplomatic  
 notification, so that every vessel may have, or may  
 be supposed to have, notice of the existence of a  
 blockade. And for the same reason some States, as  
 France and Italy, never consider a vessel to have  
 committed a breach of blockade unless a special  
 warning was given her before her attempted ingress

No Breach  
 without  
 Notice of  
 Blockade.

<sup>1</sup> See article 37 of U.S. Naval War Code.

by one of the blockading cruisers stopping her and recording the warning upon her log-book.<sup>1</sup>

British, American, and Japanese practice regarding the necessary knowledge of the existence of a blockade on the part of a vessel makes a distinction between actual and constructive notice, no breach of blockade being held to exist without either the one or the other.<sup>2</sup> Actual notice is knowledge acquired by a vessel of the existing blockade, whether through a direct warning from one of the blockading men-of-war or knowledge acquired from any other public or private source of information. Constructive knowledge is presumed knowledge of the blockade on the part of a vessel on the ground either of notoriety or of diplomatic notification. The existence of a blockade is always presumed to be notorious to vessels within the blockaded ports, but it is a question of fact whether it is notorious to other vessels. And knowledge of the existence of a blockade is always presumed on the part of a vessel in case sufficient time has elapsed since the home State of the vessel has received diplomatic notification of the blockade, so that it could inform thereof all vessels sailing under its flag, whether or not they have actually received, or taken notice of, the information.<sup>3</sup>

What constitutes an Attempt to break Blockade.

§ 385. The practice of the States as well as the opinions of writers differ much regarding such acts of a vessel as constitute an attempt to break blockade.

(1) The Second Armed Neutrality of 1800 intended to restrict an attempt to break blockade to the employment of force or ruse by a vessel on the line

<sup>1</sup> See above, § 376.

<sup>2</sup> See Holland, Prize Law, §§ 107, 114-127; U.S. Naval War Code, article 39; Japanese Prize Law, article 30.

<sup>3</sup> The *Vrouw Judith*, 1 Rob. 150; the *Neptunus*, 2 Rob. 110; the *Calypso*, 2 Rob. 298; the *Neptunus*, 3 Rob. 173; the *Hoffnung*, 6 Rob. 112.

of blockade for the purpose of passing through. This is, on the whole, the practice of France, which moreover, as stated before, requires that the vessel shall previous to the attempt have received special warning from one of the blockading men-of-war. Many writers<sup>1</sup> take the same standpoint.

(2) The practice of other States, as Japan, approved by many writers,<sup>2</sup> goes beyond this and considers it an attempt to break blockade for a vessel, with or without force or ruse, to endeavour to pass the line of blockade. This practice frequently sees an attempt complete in the fact that a vessel destined for a blockaded place is found anchoring or cruising near the line of blockade.

(3) The practice of Great Britain and the United States of America goes farthest, since it considers it an attempted breach of blockade for a vessel, not destined according to her ship papers for a blockaded port, to be found near it and steering for it, and, further, for a vessel destined for a port the blockade of which was diplomatically notified to start on her journey knowing that the blockade has not yet been raised, except, "when the port from which the vessel sails is so distant from the scene of war as to justify her master in starting with a destination known to be blockaded, on the chance of finding that the blockade has been removed, and, should that not prove to be the case, with an intention of changing her destination."<sup>3</sup> This practice, further, applies

<sup>1</sup> See Hantefeuille, II. p. 134; Kleen, I. § 137; Gessner, p. 202; Dupuis, No. 185; Fauchille, Blocus, p. 322.

<sup>2</sup> See Bluntschli, § 835; Perels, § 51; Geffcken in Holtzendorff, IV. p. 763; Rivier, II. p. 431. See also § 25 of the Prussian Regulations

concerning Naval Prizes, and article 31 of the Japanese Naval Prize Law.

<sup>3</sup> See Holland, Prize Law, § 133, and U.S. Naval War Code, article 42; the Betsy, 1 Rob. 332.

the doctrine of continuous voyages<sup>1</sup> to blockade, for it considers an attempt of breach of blockade to have been committed by such vessel as, although ostensibly destined for a neutral or an unblockaded port, is in reality intended, after touching there, to go on to a blockaded port.<sup>2</sup>

(4) During the Civil War the American Prize Courts carried the practice further by condemning such vessels for breach of blockade as knowingly carried to a neutral port cargo which was ultimately destined for a blockaded port, and by condemning for breach of blockade such cargo, without the vessel, as was ultimately destined for a blockaded port, the carrying vessel being ignorant of this ulterior destination of the cargo. Thus the "Bermuda,"<sup>3</sup> a British vessel with a cargo, part of which was, in the opinion of the American Courts, ultimately destined for the blockaded ports of the Confederate States, was seized on her voyage to the neutral British port of Nassau, in the Bahama Islands, and was condemned for breach

<sup>1</sup> The so-called doctrine of continuous voyages dates from the time of the Anglo-French wars at the end of the eighteenth century, and is connected with the application of the so-called rule of 1756. (See above, § 289.) Neutral vessels engaged in French and Spanish colonial trade, thrown open to them during the war, sought to evade seizure by British cruisers and condemnation by British Prize Courts, according to the rule of 1756, by taking their cargo to a neutral port, landing it and paying import duties there, and then re-lading it and carrying it to the mother country of the respective colony. Thus, in the case of the "William" (5 Rob. 385), it was proved that this neutral vessel took a cargo

from the Spanish port La Guira to the port of Marblehead in Massachusetts—the United States being neutral—landed the cargo, paid import duties there, then took in the chief part of this cargo besides other goods, and sailed after a week for the Spanish port of Bilbao. In all such cases the British Prize Courts considered the voyages from the colonial port to the neutral port and from there to the enemy port as one continuous voyage and confirmed the seizure of the ships concerned. See Remy, *Théorie de la continuité du voyage en matière de blocus et de contrebande* (1902).

<sup>2</sup> See Holland, *Prize Law*, § 134. The *James Cook*, Edwards, 261.

<sup>3</sup> 3 Wallace, 514.

of blockade by the American Courts. The same happened to the British vessel "Stephen Hart,"<sup>1</sup> which was seized on her voyage to the neutral port of Cardenas, in Cuba. And in the famous case of the "Springbok,"<sup>2</sup> a British vessel also destined for Nassau, in the Bahama Islands, which was seized on her voyage to this neutral British port, the cargo alone was finally condemned for breach of blockade, since, in the opinion of the Court, the vessel was not cognisant of the ulterior destination of the cargo for a blockaded port. The same happened to the cargo of the British vessel "Peterhoff"<sup>3</sup> destined for the neutral port of Matamaros, in Mexico. The British Government declined to intervene in favour of the British owners of the respective vessels and cargoes.<sup>4</sup>

It is true that the majority of authorities<sup>5</sup> assert the illegality of these judgments of the American Prize Courts, but the fact that Great Britain recognises as correct the principles which are the basis of these judgments will probably have the consequence that they will in future be applied by British as well as foreign Prize Courts. The whole matter calls for an international agreement of the members of the Family of Nations.

§ 386. Although blockade inwards interdicts ingress to all vessels, if not especially licensed, necessity makes exceptions to the rule. Whenever a

When  
Ingress is  
not con-  
sidered  
Breach of  
Blockade.

<sup>1</sup> 3 Wallace, 559.

<sup>2</sup> 5 Wallace, 1.

<sup>3</sup> 5 Wallace, 28.

<sup>4</sup> See Parliamentary Papers, Miscellaneous, N. 1 (1900) "Correspondence regarding the Seizure of the British Vessels Springbok and Peterhoff by the United States Cruisers in 1863."

<sup>5</sup> See, for instance, Holland, Prize Law, p. 38, note 2; Philli-

more, III. § 298; Twiss, Belligerent Right on the High Seas (1884), p. 19; Hall, § 263; Gessner, Kriegführende und neutrale Mächte (1877), pp. 95-100; Bluntschli, § 835; Perels, § 51; Fauchille, pp. 333-344; Ullmann, § 154, p. 331, note 6; Martens, II. § 124. See also Wharton, III. § 362, p. 401.

vessel is by need of repairs,<sup>1</sup> stress of weather,<sup>2</sup> want of water<sup>3</sup> or provisions, or upon any other ground absolutely obliged to enter a blockaded port, such ingress does not constitute a breach of blockade.

On the other hand, according to the British practice at least, ingress does not cease to be breach of blockade if caused by intoxication of the master,<sup>4</sup> ignorance<sup>5</sup> of the coast, loss of compass,<sup>6</sup> endeavour to get a pilot,<sup>7</sup> and the like, or an attempt to ascertain<sup>8</sup> whether the blockade was not raised.<sup>9</sup>

When  
Egress is  
not con-  
sidered  
Breach of  
Blockade.

§ 387. There are a few cases of egress which are, according to British and most other States' practice, not considered breaches of blockade outwards.<sup>10</sup> Thus, a vessel that was in the blockaded port before the commencement of the blockade<sup>11</sup> may sail from this port in ballast, as may a vessel that entered during a blockade either in ignorance of it or with the permission of the blockading squadron.<sup>12</sup> Thus, further, a vessel the cargo of which was put on board before the commencement of the blockade may leave the port afterwards unhindered.<sup>13</sup> Thus, again, a vessel obliged by absolute necessity to enter a blockaded port may afterwards leave it unhindered. And a vessel employed by the diplomatic envoy of a neutral State for the exclusive purpose of sending home from a blockaded port distressed seamen of his nationality may also pass unhindered.<sup>14</sup>

<sup>1</sup> *The Charlotte*, Edwards 252.

<sup>2</sup> *The Fortuna*, 5 Rob. 27.

<sup>3</sup> *The Hurtige Hanne*, 2 Rob.

124.

<sup>4</sup> *The Shepherdess*, 5 Rob. 262.

<sup>5</sup> *The Adonis*, 5 Rob. 256.

<sup>6</sup> *The Elizabeth*, Edwards, 198.

<sup>7</sup> *The Neutralitet*, 6 Rob. 30.

<sup>8</sup> *The Spes and Irene*, 5 Rob.

76.

<sup>9</sup> See Holland, Prize Law,

§§ 135-136.

<sup>10</sup> See Holland, Prize Law, § 130; Twiss, II. § 113; Phillimore, III. § 313.

<sup>11</sup> *The Frederick Moltke*, 1 Rob. 86.

<sup>12</sup> *The Juno*, 2 Rob. 116.

<sup>13</sup> *The Vrouw Judith*, 1 Rob.

150.

<sup>14</sup> *The Rose in Bloom*, 1 Dodson, 55.

§ 388. A breach of blockade can only be committed by passing through the blockaded approach. Therefore, if the maritime approach to a port is blockaded from which an inland canal leads to another unblockaded port of the enemy or to a neutral port, no breach of blockade is committed through the egress or the ingress of a vessel passing such canal for the purpose of reaching the blockaded port.<sup>1</sup>

Passage through Unblockaded Canal no Breach of Blockade.

## V

### CONSEQUENCES OF BREACH OF BLOCKADE

See the literature quoted above at the commencement of § 368.

§ 389. It is generally recognised that a vessel may be captured for a breach of blockade *in delicto* only, that means, during the time an attempt to break it, or the breach itself, is committed. But here again practice as well as theory differ much, since there is no unanimity with regard to the extent of time during which an attempt of breach and the breach itself can be said to be actually continuing.

Capture of Blockad-running Vessels.

(1) It has already been stated above in § 385 that it is a moot point when an attempt to break a blockade can be said to be continuing, and that according to the practice of Great Britain and the United States such attempt is already to be found in the fact that a vessel destined for a blockaded port is starting on her voyage. It is obvious that the controversy bears upon the question from what point of time a blockade-running vessel must be considered *in delicto*.

(2) But it is likewise a moot point when the period

<sup>1</sup> The *Stert*, 4 Rob. 65. See Phillimore, III. § 314.



of time comes to an end during which a blockade-running vessel may be said to be *in delicto*. According to Continental theory and practice, such vessel is *in delicto* only as long as she is on the spot of the line of blockade, or, having fled from there, as long as she is pursued by one of the blockading cruisers. On the other hand, according to the practice of Great Britain<sup>1</sup> and the United States,<sup>2</sup> a blockade-running vessel is held to be *in delicto* as long as she *has not completed her voyage from the blockaded port to the port of her destination and back to the port from which she started originally*, the voyage out and home being considered one voyage. But a vessel is held to be *in delicto* as long only as the blockade continues, capture being no longer admissible in case the blockade has been raised or has otherwise come to an end.

Penalty  
for Breach  
of  
Blockade.

§ 390. Capture being effected, the blockade-runner is to be sent to a port to be brought before a Prize Court. For this purpose the crew may be temporarily detained, as they will have to serve as witnesses. In former times the crew could be imprisoned, and it is said that even capital<sup>3</sup> punishment could have been pronounced against them. But since the eighteenth century this practice has been abandoned, and nowadays the crew cannot even be made prisoners of war, but must be released as soon as the Prize Court has pronounced its verdict.<sup>4</sup> The only penalty which may be pronounced is confiscation of the vessel and the cargo. But the practice<sup>5</sup> of the different States differs much concerning the penalty for breach of blockade.

<sup>1</sup> The *Welvaart van Pillaw*, publ., I. c. 11.

<sup>2</sup> Rob. 128; General Hamilton, 6 Rob. 61.

<sup>3</sup> See U.S. Naval War Code, article 44.

<sup>5</sup> See Bynkershoek, *Quaest. jur.*

<sup>4</sup> See *Calvo*, V. §§ 2897-2898. U.S. Naval War Code, article 45.

<sup>5</sup> See Fauchille, *Blocus*, pp. 357-394; Gessner, pp. 210-214; Perels, § 51, pp. 276-278.

According to British and American practice, confiscation of both vessel and cargo takes place in case the owners of the vessel are identical with those of the cargo. In case vessel and cargo have not the same owners, confiscation of both takes place only when either the cargo consists of contraband of war or the owners knew of the blockade at the time the cargo was shipped for the blockaded port.<sup>1</sup> And it matters not whether the captured vessel which carries the cargo has herself actually passed through the blockaded line, or the breach of blockade was effected through a combined action of lighters and the vessel, the lighters passing the line and discharging the cargo into the vessel near the line, or *vice versa*.<sup>2</sup>

The cargo alone was confiscated according to the judgments of the American Prize Courts during the Civil War in the case of the "Springbok" and in similar cases<sup>3</sup> when goods ultimately destined for a blockaded port were sent to a neutral port on a vessel whose owners were ignorant of this ulterior destination of the goods.

<sup>1</sup> *The Mercurius*, 1 Rob. 80; P.C. 168. See Phillimore, III. Columbia, 1 Rob. 154; Alexander, 4 Rob. 93; Adonis, 5 Rob. 256; Exchange, Edwards, 39; Panaghia Rhombia, 12 Moore, §§ 318-319.

<sup>2</sup> *The Maria*, 6 Rob. 201.

<sup>3</sup> See above, § 385 (4).

## CHAPTER IV

### CONTRABAND

#### I

#### CONCEPTION OF CONTRABAND

Grotius, III. c. 1, § 5—Bynkershoek, *Quaest. jur. publ.* I. cc. IX—XII—Vattel, III. §§ 111—113—Hall, §§ 236—247—Lawrence, §§ 277—281—Maine, pp. 96—122—Manning, pp. 352—399—Phillimore, III §§ 226—284—Twiss, II. §§ 121—151—Halleck, II. pp. 214—238—Taylor, §§ 653—666—Walker, §§ 73—75—Wharton, III. §§ 368—375—Wheaton, §§ 476—508—Bluntschli, §§ 801—814—Heffter, §§ 158—161—Geffcken in Holtzendorff, IV. pp. 713—731—Garais, § 89—Liszt, § 42—Ullmann, § 166—Bonfils, Nos. 1537—1587—Despagnet, Nos. 687—690—Rivier, II. pp. 416—423—Calvo, V. §§ 2708—2795—Flore, III. Nos. 1591—1601—Martens, II. § 136—Kleen, I. §§ 70—102—Boeck, Nos. 606—659—Pillet, pp. 315—330—Gessner, pp. 70—144—Perels, §§ 44—46—Testa, pp. 201—220—Lawrence, War, pp. 140—174—Ortolan, II. pp. 165—213—Hautefeuille, II. pp. 69—172—Dupuis, Nos. 199—230—Holland, *Prize Law*, §§ 57—87—U.S. Naval War Code, articles 34—36—Heineccius, "*De navibus ob vecturam vetitarum mercium commissis dissertatio*" (1740)—Huebner, "*De la saisie des bâtiments neutres*," 2 vols. (1759)—Valin, "*Traité des prises*," 2 vols. (1763)—Martens, "*Essai sur les armateurs, les prises, et surtout les reprises*" (1795)—Lampredi, "*Del commercio dei populi neutrali in tempo di guerra*" (1801)—Tetens, "*Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer*" (1805)—Pistoye et Duverdy, "*Traité des prises maritimes*," 2 vols. (1855)—Moseley, "*What is Contraband and what is not?*" (1861)—Upton, "*The Law of Nations affecting Commerce during War*" (1863)—Lehmann, "*Die Zufuhr von Kriegscontrabandewaren, etc.*" (1877)—Kleen, "*De contrebande de guerre et des transports interdits aux neutres*" (1893)—Vossen, "*Die Kontrebande des Kriegen*" (1896)—Manceaux, "*De la contrebande de guerre*" (1899)—Brochet, "*De la contrebande de guerre*" (1900)—Hirsch, "*Kriegscontrebande und verbotene Transporte in Kriegszeiten*" (1901)—Pincitore, "*Il contrabbando di guerra*" (1902)—Knight, "*Des états neutres au point de vue de la contrebande de guerre*" (1903)—Wiegner, "*Die Kriegskontrebande*" (1904)—Westlake in R.I., II. (1870), pp. 614—

655—Kleen in R.I., XXV. (1893), pp. 7, 124, 209, 389, and XXVI. pp. 214-217 (1894)—Bar in R.I., XXVI. (1894), pp. 401-414—Brocher de la Fléchère in R.I., 2nd ser. I. (1899), pp. 337-353—Fauchille in R.G., IV. (1897), pp. 297-323—Kleen in R.G., XI. (1904), pp. 353-362—Gover in the "Journal of the Society of Comparative Legislation," new series, II. (1900) pp. 118-130.

§ 391. The term contraband derives from the Italian "contrabbando," which, itself deriving from the Latin "contra" and "bannum" or "bandum," means "in defiance of an injunction." Contraband of war is the designation of such goods as are interdicted by either belligerent to be carried to the enemy on the ground that they enable the latter to carry on the war with greater vigour. But this definition is only a formal one, as it does not say what kinds of goods belong to the class of contraband. This point is indeed, and always was, much controverted. The matter still stands as Grotius explained it. Although he does not employ the term contraband, he treats of the matter. He<sup>1</sup> distinguishes three different kinds of articles. Firstly, those which, as arms for instance, can only be made use of in war, and which are, therefore, always contraband. Secondly, those, as articles of luxury, which can never be made use of in war and which, therefore, are never contraband. Thirdly, those which, as money, provisions, ships, and articles of naval equipment, may be made use of in war as well as in peace, and which are on account of their ancipitous use contraband or not according to the circumstances of the case. In spite of Bynkershoek's decided opposition<sup>2</sup> to this distinction of Grotius, the

Definition  
of Contra-  
band of  
War.

<sup>1</sup> See Grotius, III. c. 1, § 5:—"Sunt res quae in bello tantum usum habent, ut arma: sunt quae in bello nullum habent usum, ut quae voluptati inserviunt: sunt quae et in bello et extra bellum usum habent, ut pecuniae, com-

meatus, naves, et quae navibus adsunt. . . . In tertio illo genere usus ancipitis, distinguendus erit belli status. . . ."

<sup>2</sup> See Bynkershoek, Quaest. jur. publici, I. c. X.

practice of most belligerents has down to the present day been in conformity with it. A great many treaties have from the beginning of the sixteenth century been concluded between different States for the purpose of fixing what articles belonging to the class of ancipitous use should and what should not be regarded as contraband between the parties, but all these treaties disagree with one another. And, as far as they are not bound by a treaty, belligerents always have exercised, and still exercise, their discretion in every war according to the special circumstances and conditions in regarding or not regarding certain articles of ancipitous use as contraband. The endeavour of the First and the Second Armed Neutrality of 1780 and 1800 to restrict once for all the number and kinds of articles that could be regarded as contraband failed, and the Declaration of Paris of 1856 uses the term contraband without any attempt to define it.<sup>1</sup>

Absolute  
and con-  
ditional  
Contra-  
band.

§ 392. Apart from the distinction between articles which can be made use of only in war and those of ancipitous use, two different classes of contraband must be distinguished.

There are, first, articles which by their very character are primarily and ordinarily destined to be made use of in war. In this class are to be reckoned not only arms and ammunition, but also such articles of ancipitous use as military stores, naval stores, and the like. They are termed absolute contraband.

There are, secondly, articles which by their very character are primarily and ordinarily not destined to be made use of in war, but which under certain

<sup>1</sup> Although—see above, §§ 173–174—prevention of carriage of contraband is a means of sea warfare against the enemy, it chiefly concerns neutral commerce and is, therefore, more conveniently treated together with neutrality.

circumstances and conditions may be of the greatest use for a belligerent for the continuation of the war. To this class belong, for instance, horses, provisions, and coal. These articles are termed conditional or relative contraband.

Although all States do not make this distinction, they distinguish nevertheless, in so far as they vary in their different wars, the list of articles which they declare contraband: certain articles, as arms and ammunition, being always on the list, other articles being considered contraband only then when the circumstances of a particular war make it necessary. The majority of writers approve of the distinction between absolute and conditional contraband, although there are several who insist that arms and ammunition only and exclusively can be recognised as contraband, and that conditional contraband does not exist.<sup>1</sup> The distinction would seem to be important not only regarding the question whether or not an article is contraband, but also regarding the consequences of carrying contraband.<sup>2</sup>

§ 393. That absolute contraband cannot and need not be restricted to arms and ammunition only and exclusively becomes obvious, if the fact is taken into consideration that other articles, although of ancipitous use, may be as valuable and essential to a belligerent for the continuance of the war as arms and ammunition. The necessary machinery and material for the manufacture of arms and ammunition are almost as valuable as the latter themselves, and warfare on sea can as little be waged without vessels and articles of naval equipment as without arms and ammunition. But no unanimity exists with

Articles  
absolutely  
Contra-  
band.

<sup>1</sup> See, for instance, Hautefeuille, II. p. 157, and Kleen, I. § 90.

<sup>2</sup> See below, § 406.

regard to such articles of ancipitous use as have to be considered as absolute contraband, and States, when they go to war, increase or restrict, according to the circumstances of the particular war, the list of articles they consider absolute contraband.

According to British practice<sup>1</sup>—subject, however, to the prerogative of the Crown to order alterations of the list during a war—the following articles are considered absolute contraband: Arms of all kinds, and machinery for manufacturing arms; ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash (chloride of potassium), chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpetre and brimstone, also guncotton; military equipments and clothing; military stores; naval stores, such as masts, spars, rudders, ship timbers, hemp and cordage, sailcloth, pitch and tar, copper for sheathing vessels, marine engines and the component parts thereof (including screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates and fire bars), maritime cement and the materials used for its manufacture (as blue lias and Portland cement), iron in any of the following forms: anchors, rivet-iron, angle-iron, round bars of from  $\frac{3}{4}$  to  $\frac{5}{8}$  of an inch diameter, rivets, strips of iron, sheet plate-iron exceeding  $\frac{1}{4}$  of an inch, and Low Moor and Bowling plates.

It must be specially observed that, although belligerents must have a free hand in increasing or restricting, according to the circumstances of the particular war, the list of articles of absolute contraband, it ought not altogether to be left to the discretion of belligerents to declare any articles they like as absolute contraband. The test to be applied

<sup>1</sup> See Holland, *Prize Law*, § 62.

is whether, under the special circumstances of a particular war, the article concerned is by its character primarily and ordinarily destined to be made use of for military or naval purposes. If that is not the case, an article ought not to be declared absolute contraband, although it may be declared contraband when clearly destined for military or naval purposes. Thus, for instance, provisions are not by their character primarily and ordinarily destined to be made use of in war, and they can for this reason not be declared absolute contraband, although they may be declared conditional contraband.<sup>1</sup>

§ 394. There are many articles which are not by their character destined to be made use of in war, but are nevertheless of great value to belligerents for the continuance of the war. Such articles are conditionally contraband, which means that they are contraband when it is clearly apparent that they are intended to be made use of for military or naval purposes. This intention becomes apparent on considering either the destination of the vessel carrying the articles concerned, or the consignee of the articles. If such destination is an enemy fleet, or an enemy port exclusively or mainly used for military or naval equipment, or if the consignee is a contractor for the enemy army and navy, it may justly be presumed that the goods are intended to be made use of for military or naval purposes. What articles belong to this class cannot be decisively laid down.

Articles  
condition-  
ally Con-  
traband.

<sup>1</sup> At the outbreak of the Russo-Japanese War, Russia made no distinction between absolute and conditional contraband, declaring all the articles concerned contraband outright. But on the pro-

tests of Great Britain and the United States of America, Russia admitted the distinction, declaring provisions, cotton, and similar articles, only conditional contraband. See below, § 394.



Neither the practice of States nor the opinion of writers agrees upon the matter, and it is in especial controverted<sup>1</sup> whether or not foodstuffs, horses and other beasts of burden, coal and other fuel, money and the like, and cotton can conditionally be declared contraband.

(1) That *foodstuffs* cannot under ordinary circumstances be declared contraband there ought to be no doubt. There are even several<sup>2</sup> writers who emphatically deny that foodstuffs can ever be conditional contraband. But the majority of writers admit that foodstuffs destined for the use of the enemy army or navy may be declared contraband. This is also the practice of Great Britain,<sup>3</sup> the United States of America, and Japan. But France declared in 1885, during her hostilities against China, rice in general as contraband, on the ground of the importance of this article for the Chinese population. And Russia in 1904, during the Russo-Japanese war, declared rice and provisions in general as contraband; on the protest of Great Britain and the United States of America, however, she altered her decision and declared these articles conditional contraband only.

(2) The importance of *horses and other beasts of burden* for cavalry, artillery, and military transport explains their frequently being declared as contraband by belligerents. No argument has any basis against their character as conditional contraband. But they are frequently declared absolute contraband, as, for instance, by article 36 of the United States Naval War Code. Russia, which during the Russo-Japanese War altered her standpoint taken

<sup>1</sup> See Perels, § 45, and Hall, §§ 242-246, who give bird's-eye views of the controversy.

<sup>2</sup> See, for instance, Bluntschli, § 807.

<sup>3</sup> The *Jonge Margaretha*, 1 Rob. 189.

up at first, and recognised the distinction between absolute and conditional contraband, nevertheless maintained her declaration of horses and beasts of burden as absolute contraband.

(3) Since men-of-war are nowadays steamers, the importance of *coal*, and eventually other fuel for steamers, for waging war on sea is obvious. For this reason, Great Britain has ever since 1854 maintained that coal, if destined for belligerent men-of-war or belligerent naval ports, is contraband. But in 1859 France and Italy did not take up the same standpoint. Russia, although in 1885 she declared that she would never consent to coal being regarded as contraband, declared in 1904 coal, naphtha, alcohol, and every other kind of fuel, absolute contraband. And she adhered to this standpoint, although she was made to recognise the distinction between absolute and conditional contraband.

(4) As regards *money*, unwrought precious metals which may be coined into money, bonds and the like, the mere fact that a neutral is prohibited by his duty of impartiality from granting a loan to a belligerent ought to bring conviction that these articles are contraband if destined for the enemy State or its forces. However, the case seldom happens that these articles are brought by neutral vessels to belligerent ports, since under the modern conditions of trade belligerents can be supplied in other ways with the necessary funds.

(5) As regards *raw cotton*, it is asserted<sup>1</sup> that in 1861, during the Civil War, the United States declared it absolute contraband under quite peculiar circumstances, since it took the place of money sent abroad

<sup>1</sup> See Hall, § 246, p. 690, note 2; Taylor, § 662; Wharton, III. § 373.

for the purpose of paying for vessels, arms, and ammunition. This assertion seems to be based on the following extract from a communication of Mr. Bayard, Secretary of State, to Mr. Muruaga on June 28, 1886, printed by Wharton, III. § 373, p. 438:—

“Cotton was useful as collateral security for loans negotiated abroad by the Confederate States Government, or, as in the present case, was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed by the Confederacy, and its sale interdicted except under regulations established by, or contract with, the Confederate Government. Cotton was thus officially classed among war supplies, and, as such, was liable to be destroyed when found by the Federal troops, or turned to any use which the exigencies of war might dictate. . . . Cotton, in fact, was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining those indispensables of warfare. In International Law there could be no question as to the right of the Federal commanders to seize it as contraband of war, whether they found it on rebel territory or intercepted it on the way to the parties who were to furnish in return material aid in the form of the sinews of war—arms or general supplies.”

But this assertion that cotton was declared contraband during the American Civil War would seem to be erroneous. Holland<sup>1</sup> points out:—“It has, indeed, been alleged that cotton was declared to be ‘contraband’ by the United States in their Civil War. The Federal proclamations will, however, be

<sup>1</sup> See Professor Holland's letter, “Cotton as Contraband of War,” in the “Times” of July 2, 1905.

searched in vain for anything of the kind. The mistake is due to an occasional loose employment of the term, as descriptive of articles found by an invader in an enemy's territory, which, although the property of private, and even neutral, individuals, happen to be so useful for the purposes of the war as to be justly confiscated. That this was so will appear from an attentive reading of the case of *Mrs. Alexander's cotton*, in 1861 (2 Wallace, 404), and of the arguments in the claim made by Messrs. Maza and Larrache against the United States in 1886 (*Foreign Relations of United States*, 1887)."

Be that as it may, raw cotton cannot under ordinary circumstances be considered absolute contraband. For this reason Great Britain protested when Russia in 1904, during the Russo-Japanese War, declared cotton in general as contraband. Russia altered her standpoint and declared cotton conditional contraband only.<sup>1</sup>

§ 395. Whatever may be the nature of articles, they are never contraband unless they are destined for the use of a belligerent in war. Arms and ammunition destined for a neutral are as little contraband as other goods with the same destination. As this hostile destination is essential even for articles which are obviously used in war, such hostile destination is all the more important for such articles of ancipitous use as are only conditionally contraband. Thus, for instance, provisions and coal are

Hostile  
Destina-  
tion  
essential  
to Contra-  
band. ✓

<sup>1</sup> According to British practice—see *Holland, Prize Law*, § 64—the list of conditional contraband comprises:—Provisions and liquors for the consumption of army and navy; money, telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the

construction of a railway, as iron bars, sleepers, and the like; coal, hay, horses, rosin, tallow, timber. But it is in the prerogative of the Crown to extend or reduce this list during a war according to the requirements of the circumstances.

perfectly innocent and not at all contraband if they are not purposely destined for enemy troops and naval forces, but are destined for use by a neutral. However, the destination of the articles must not be confounded with the destination of the vessel which carries them. For it will be shown<sup>1</sup> that, on the one hand, articles with a hostile destination are considered contraband although the carrying vessel is destined for a neutral port, and that, on the other hand, articles, although they are without a hostile destination, are considered contraband because the carrying vessel is to touch at an intermediate enemy port and is, therefore, destined for such port, although her ultimate destination is a neutral port.

Articles  
destined  
for the  
Use of the  
Carrying  
Vessel.

§ 396. Hostile destination being essential for all kinds of articles to be considered contraband, all such articles as are carried by a vessel apparently for her own use are never contraband. Merchantmen frequently carry a gun and some amount of ammunition for the purpose of signalling, and, if they navigate in parts of the sea dangerous on account of piracy, they frequently carry a certain amount of arms and ammunition for defence against an attack by pirates. It will not be difficult either for the searching belligerent man-of-war or for the Prize Court to ascertain whether or not such arms and ammunition are carried *bonâ fide*.

Contra-  
band  
Vessels.

§ 397. A neutral vessel, whether carrying contraband or not, may be herself contraband. This is the case when she is built or fit for use in war and is on her way to the enemy. Such vessel being equivalent to arms, although she may not yet be fitted with arms, is, of course, absolutely contraband.<sup>2</sup> And it

<sup>1</sup> See below, §§ 399-401.

See Twiss, II. § 148, and Holland,

<sup>2</sup> The Richmond, 5 Rob. 325. Prize Law, § 86.

must be specially observed that she need not at all be fit for use as a man-of-war; it suffices that she is fit to be used for the transport of troops and the like.

That a neutral is not obliged by his duty of impartiality to prevent his subjects from supplying a belligerent with vessels except where the vessel concerned is built or fitted out *by order* of a belligerent, is shown above in §§ 334 and 350.<sup>1</sup>

## II

### CARRIAGE OF CONTRABAND

See the literature quoted above at the commencement of § 391.

§ 398. The guaranteed freedom of commerce making the sale of articles of all kinds to belligerents by subjects of neutrals legitimate, articles of conditional as well as absolute contraband may be supplied by sale to either belligerent by these individuals. And the carriage of such articles by neutral merchantmen on the Open Sea is, as far as International Law is concerned, quite as legitimate as their sale. The carrier of contraband by no means violates an injunction of the Law of Nations. But belligerents have by the Law of Nations the right to prohibit and punish the carriage of contraband by neutral merchantmen, and the carrier of contraband violates, for this reason, an injunction of the belligerent concerned. It is not International Law, but the Municipal Law of the belligerents, which makes carriage of contraband illegitimate and penal.<sup>2</sup> The

Carriage of Contraband Penal by the Municipal Law of Belligerents.

<sup>1</sup> See also above, § 321, concerning the sale, during the Russo-Japanese War, of several German liners to Russia.

<sup>2</sup> See above, § 296.

question why the carriage of contraband articles may nevertheless be prohibited and punished by the belligerents, although it is quite legitimate as far as International Law is concerned, can only be answered by a reference to the historical development of the Law of Nations. In contradistinction to former practice, which interdicted all trade between neutrals and the enemy, the principle of freedom of commerce between subjects of neutrals and either belligerent has gradually become universally recognised; but this recognition included from the beginning the right of either belligerent to punish carriage of contraband on the sea. And the reason obviously is the necessity for belligerents in the interest of self-preservation to prevent the import of such articles as may strengthen the enemy, and to confiscate the contraband cargo, and eventually the vessel also, as a deterrent to other vessels.

The present condition of the matter of carriage of contraband<sup>1</sup> is therefore a compromise. In the interest of the generally recognised principle of freedom of commerce between belligerents and subjects of neutrals, International Law does not require neutrals to prevent their subjects from carrying contraband; on the other hand, International Law empowers either belligerent to prohibit and punish carriage of contraband in the same way as it—see above, § 383—empowers either belligerent to prohibit and punish breach of blockade.

Direct  
Carriage  
of Contra-  
band.

§ 399. Carriage of contraband commonly occurs where a vessel is engaged in carrying to an enemy port such goods as are contraband when they have a hostile destination. In such cases it matters not

<sup>1</sup> The same applies to blockade-running and carriage of analogous of contraband.

whether the fact that the vessel is destined for an enemy port becomes apparent from her papers, she being bound to such port, or whether she is found at sea sailing on a course for an enemy port, although her papers show her to be bound to a neutral port. And it, further, matters not, according to the practice of Great Britain and the United States of America at least, that she is bound to a neutral port and that the articles concerned are, according to her papers, destined for a neutral port, if only she is to call at an intermediate enemy port or is to meet enemy naval forces at sea in the course of her voyage to the neutral port of destination;<sup>1</sup> for otherwise the door would be open to deceit, and it would always be pretended that goods which a vessel is engaged in carrying to such intermediate enemy places were intended for the neutral port of ultimate destination. For the same reason a vessel carrying such articles as are contraband when they have a hostile destination is considered carrying contraband if her papers show that her destination is dependent upon contingencies under which she may have to call at an enemy port,<sup>2</sup> unless she proves that she has abandoned the intention of eventually calling there.

§ 400. On occasions a neutral vessel carrying such articles as are contraband if they have a hostile destination is, according to her papers, ostensibly bound to a neutral port, but is intended, after having called and eventually having delivered her cargo there, to carry the same cargo from there to an enemy port. There is, of course, no doubt that such vessels are carrying contraband whilst engaged in carrying the articles concerned from the neutral to the enemy port. But during the American Civil

Circuits of  
Carriage  
of Contra-  
band.

<sup>1</sup> See Holland, Prize Law, § 69. <sup>2</sup> See Holland, Prize Law, § 70.



War the question arose whether they may already be considered carrying contraband on their way from the port of starting to the neutral port from which they are afterwards to carry the cargo to an enemy port, since they are really intended to carry the cargo from the port of starting to an enemy port, although not directly, but circuitously, on a roundabout way. The American Prize Courts answered the question in the affirmative by applying to the carriage of contraband the principle of *dolus non purgatur circuitu* and the so-called doctrine of continuous voyages.<sup>1</sup> This attitude of the American Prize Courts has called forth protests on the part of many authorities,<sup>2</sup> British as well as foreign, but Great Britain has not protested, and from the attitude of the British Government in the case of the "Bundesrath" and other vessels in 1900 during the South African War it may safely, although indirectly only, be concluded that Great Britain considers the practice of the American Prize Courts correct and just, and that as a belligerent she intends to apply the same principles. This may also be inferred from § 71 of Holland's "Manual of Naval Prize Law," which establishes the rule: "The ostensible destination of a vessel is sometimes a neutral port, while she is in reality intended, after touching,

<sup>1</sup> See above, § 385 (4), where the cases of the "Bermuda" and the "Stephen Hart" are quoted. In all those and the like cases the doctrine of continuous voyages was said to apply as well to carriage of contraband as to breach of blockade.

<sup>2</sup> See, for instance, Hall, § 247. But Phillimore, III. § 227, p. 391, says of the judgments of the Supreme Court of the United States in the cases of the "Bermuda" and the "Peterhoff," that they "contain very valuable and sound expositions of the law,

professedly, and for the most part really in harmony with the earlier decisions of English Prize Courts." On the other hand, Phillimore, III. § 298, p. 490, disagrees with the American Courts regarding the application of the doctrine of continuous voyages to breach of blockade, and reprobates the decision in the case of the "Springbok." See also Remy, *Théorie de la continuité du voyage en matière de blocus et de contrebande de guerre* (1902), and Fauchille in R.G., IV. (1897), pp. 297-323.

and even landing and colourably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be 'continuous,' and the destination is held to be hostile throughout." And provided that the intention of the vessel is really to carry the cargo circuitously, by a roundabout way, to an enemy port, and provided, further, that a mere suspicion is not held for a proof of such intention, I cannot see why this application of the doctrine of continuous voyages should not be considered reasonable, just, and adequate.

§ 401. It also happens in war that neutral vessels carry to neutral ports such articles as are contraband if bound for a hostile destination, the vessel being cognisant or not of the fact that arrangements have been made for the articles to be afterwards brought by land or sea into the hands of the enemy. And the question has arisen whether such vessels on their voyage to the neutral port can be considered carrying contraband of war.<sup>1</sup> Already in 1855, during the Crimean War, the French Conseil-Général des Prises, in condemning the cargo of saltpetre of the Hanoverian neutral vessel "Vrow Houwina," answered the question in the affirmative;<sup>2</sup> but it was not until the

Indirect  
Carriage  
of Con-  
traband  
(Doctrine  
of Con-  
tinuous  
Trans-  
ports).

<sup>1</sup> The question is treated with special regard to the case of the "Bundesarth," in two able articles in the Law Quarterly Review, XVII. (1901), under the titles "The Seizure of the Bundesarth" (Mr. I. Dundas White) and "Contraband Goods and Neutral Ports" (Mr. E. L. de Hart). See also Baty, International Law in South Africa (1900), pp. 1-44.

<sup>2</sup> See Calvo, V. § 2767, p. 52. The case of the Swedish neutral vessel "Commercen," which occurred in 1814, and which is frequently quoted with that of the

"Vrow Houwina" (1 Wheaton, 382), is not a case of indirect carriage of contraband. The "Commercen" was on her way to Bilbao, in Spain, carrying a cargo of provisions for the English Army in Spain, and she was captured by a privateer commissioned by the United States of America, which was then at war with England. When the case, in 1816, came before Mr. Justice Story, he reprobated the argument that the seizure was not justified because a vessel could not be considered carrying contraband when on her

American Civil War that the question was decided on principle. Since from the British port of Nassau, in the Bahamas, and from other neutral ports near the coast of the Confederate States, goods, first brought to these nearer neutral ports by vessels coming from more distant neutral ports, were carried to the blockaded coasts of the Southern States, Federal cruisers seized several vessels destined and actually on their voyage to Nassau and other neutral ports because all or parts of their cargoes were ultimately destined for the enemy. And the American Courts considered those vessels as carrying contraband, although they were sailing from one neutral port to another, on clear proof that the goods concerned were destined to be transported by land or sea from the neutral port of landing into the enemy territory. The leading cases are those of the "Springbok" and "Peterhoff," which are already mentioned above in § 385 (4), for the Courts found the seizure of these and other vessels justified as well on the ground of carriage of contraband as on the ground of breach of blockade. Thus, another application of the doctrine of continuous voyages came into existence, since vessels whilst sailing between two neutral ports could only be considered to be carrying contraband when the transport first from one neutral port to another and afterwards from the latter to the enemy territory had been regarded as one continuous voyage. This application of the doctrine of continuous voyages is fitly termed "doctrine of continuous transports."

The Case  
of the  
"Bundes-  
rath."

§ 402. This application of the doctrine of continuous voyages under the new form of continuous

way to a neutral port, and he tion of goods was sufficient to  
asserted that the hostile destina- justify the seizure of the vessel.

transports has likewise been condemned by many British and foreign authorities ; but here, too, Great Britain did not protest—on the contrary, she has, as was mentioned above in § 385 (4), declined to interfere in favour of the British owners of the vessels and cargoes concerned. And that she really considers the practice of the American Courts just and sound became clearly apparent by her attitude during the South African War. When, in 1900, the “ Bundesrath,” “ Herzog,” and “ General,” German vessels sailing from German neutral ports to the Portuguese neutral port of Lorenzo Marques, in Delagoa Bay, were seized by British cruisers under the suspicion of carrying contraband, Germany demanded their release, maintaining that no carriage of contraband could be said to take place by vessels sailing from one neutral port to another. But Great Britain refused to admit this principle, maintaining that articles ultimately destined for the enemy were contraband, although the vessels carrying them were bound for a neutral port.<sup>1</sup>

There is no doubt that this attitude of the British Government was contrary to the opinion of prominent English<sup>2</sup> writers on International Law. Even the “ Manual of Naval Prize Law,” edited by Professor Holland<sup>3</sup> in 1888, and “ issued by authority of the Lords Commissioners of the Admiralty,” reprobates the American practice, for in § 72 it lays down the following rule : “. . . If the destination of the vessel

<sup>1</sup> See Parliamentary Papers, Africa, No. 1 (1900); Correspondence respecting the action of H.M.'s naval authorities with regard to certain foreign vessels.

<sup>2</sup> See, for instance, Hall, § 247, and Twiss in the Law Magazine and Review, XII. (1877), pp. 130-158.

<sup>3</sup> In a letter to the “ Times ” of January 3, 1900, Professor Holland points out that circumstances had so altered since 1888 that the attitude of the British Government in the case of the “ Bundesrath ” was quite justified.

be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior destination by transshipment, overland conveyance, or otherwise." And the practice of British Prize Courts seems hitherto to have been in accordance with this rule. In 1798, during war between England and the Netherlands, the neutral ship "Imina,"<sup>1</sup> which had left the neutral port of Dantzic for Amsterdam carrying ship's timber, but on hearing of the blockade of Amsterdam by the British had changed her course for the neutral port of Emden, was seized on her voyage to Emden by a British cruiser, but she was released by Sir William Scott because she had no intention of breaking blockade, and because a vessel could only be considered carrying contraband whilst on a voyage to an enemy port. "The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy port," said Sir William Scott.<sup>2</sup>

Continental support to the Doctrine of Continuous Transports.

§ 403. Although the majority of Continental writers condemn the doctrine of continuous transports, there are several eminent Continental authorities who support it. Thus, Gessner (p. 119) asserts emphatically that the destination of the carrying vessel

<sup>1</sup> 3 Rob. 167.

<sup>2</sup> It is frequently maintained—see Phillimore, III. § 227, pp. 397-403—that in 1864, in the case of *Hobbs v. Henning*, Lord Chief Justice Erle repudiated the doctrine of continuous transports, but Professor Westlake shows that this is not the case; see Westlake's Introduction in Takahashi, International Law during the

Chino-Japanese War (1899), pp. xx-xxiii, see also Westlake in the Law Quarterly Review, XV. (1899), pp. 23-30. But I cannot see that Westlake is likewise successful in his endeavour to show that Sir William Scott had not asserted the impossibility of contraband between two neutral ports.

is of no importance compared with the destination of the carried goods themselves. Bluntschli, although he condemns in § 835 the American practice regarding breach of blockade committed by a vessel sailing from one neutral port to another, approves in § 813 expressly of the American practice regarding carriage of contraband by a vessel sailing between two neutral ports, yet carrying goods with a hostile destination. Kleen (I. § 95, p. 388) condemns the rule that the neutral destination of the vessel makes the goods appear likewise neutral, and defends seizure in the case of a hostile destination of the goods on a vessel sailing between two neutral ports; he expressly states that such goods are contraband from the moment the carrying vessel leaves the port of loading. Fiore (III. No. 1649) reprobates the theory of continuous voyages as applied by British and American Courts, but he asserts nevertheless that the hostile destination of certain goods carried by a vessel sailing to a neutral port justifies the vessel being regarded as carrying contraband and the seizure thereof. Bonfils (No. 1569) takes up the same standpoint as Bluntschli, admitting the application of the theory of continuous voyages to carriage of contraband, but reprobating its application to breach of blockade. And the Institute of International Law adopted the rule:<sup>1</sup> "*La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale.*" Thus this representative body of authorities of all nations has fully

<sup>1</sup> See § 1 of the "Réglementation de guerre," *Annuaire*, XV. (1896) internationale de la contrebande p. 230.

adopted the American application of the doctrine of continuous voyages to contraband, and thereby recognised the possibility of circuitous as well as indirect carriage of contraband.

And it must be mentioned that the attitude of several Continental States is in favour of the American practice. Thus, according to §§ 4 and 6 of the Prussian Regulations of 1864 regarding Naval Prizes, it is the hostile destination of the goods or the destination of the vessel to an enemy port which makes a vessel appear as carrying contraband and which justifies her seizure. In Sweden the same is valid.<sup>1</sup> Thus, further, an Italian Prize Court during the war with Abyssinia in 1896 justified the seizure in the Red Sea of the Dutch vessel "Doelwijk,"<sup>2</sup> which sailed for the neutral French port of Djibouti, carrying a cargo of arms and ammunition destined for the Abyssinian army and to be transported to Abyssinia after having been landed at Djibouti.

### III

#### CONSEQUENCES OF CARRIAGE OF CONTRABAND

See the literature quoted above at the commencement of § 391.

Capture  
for Car-  
riage of  
Contra-  
band.

§ 404. It is universally recognised by theory and practice that a vessel carrying contraband may be seized by the cruisers of the belligerent concerned. But seizure is allowed only as long as a vessel is *in delicto*, which commences when she leaves the port of starting and ends when she has deposited the contraband goods, whether with the enemy or otherwise.

<sup>1</sup> See Kleen, I. p. 389, note 2.

<sup>2</sup> See Martens, N.R.G., 2nd

ser., XXVIII. p. 66. See also

below, § 438.

The rule is, therefore, generally recognised that a vessel which has deposited her contraband cannot be seized on her return voyage. British and American practice admits, however, one exception to this rule—namely, in the case in which a vessel has carried contraband on her outward voyage with simulated and false papers.<sup>1</sup> But no exception is admitted by the practice of other countries. Thus, when in 1879, during war between Peru and Chile, the German vessel “Luxor,” after having carried a cargo of arms and ammunition from Monte Video to Valparaiso, was seized in the harbour of Callao, in Peru, and condemned for carrying contraband by the Peruvian Prize Courts, Germany interfered and succeeded in getting the vessel released.

It must be emphasised that seizure for carriage of contraband is only admissible on the Open Sea and in the maritime territorial belt of both belligerents. Seizure within the maritime belt of neutrals would be a violation of neutrality.

§ 405. Neither in theory nor in practice are rules of the same contents recognised with regard to the penalty of carriage of contraband. In former times the penalty was frequently confiscation not only of the contraband cargo itself, but also of all other parts of the cargo, together with the vessel. Only France made an exception, since according to an *ordonnance* of 1584 she did not even confiscate the contraband goods themselves, but only seized them against payment of their value, and it was not until 1681 that an *ordonnance* proclaimed confiscation of

Penalty  
for Car-  
riage of  
Contra-  
band.

<sup>1</sup> The *Nancy*, 3 Rob. 122; p. 696, calls it “undoubtedly the *Margaret*, 1 Acton, 333. severe;” Halleck, II. p. 220, See Holland, Prize Law, § 80. defends it. See also Calvo, V. Wheaton, I. § 506, note 2, con- §§ 2756–2758. demns this practice; Hall, § 247.



contraband, but with exclusion of the vessel and the innocent part of the cargo.<sup>1</sup> During the seventeenth century this distinction between contraband on the one hand, and, on the other, the innocent goods and the vessel was clearly recognised by Zouche and Bynkershoek, and confiscation of the contraband only became more and more the rule, certain cases excepted. During the eighteenth century the right to confiscate contraband was frequently contested, and it is remarkable for the change of the attitude of some States that by Article 13 of the Treaty of Friendship and Commerce<sup>2</sup> concluded in 1785 between Prussia and the United States of America all confiscation was abolished. This article provided that the belligerent should have the right to stop vessels carrying contraband and to detain them for such length of time as might be necessary to prevent possible damage by them, but such detained vessels should be paid compensation for the arrest imposed upon them. It further provided that the belligerent could seize all contraband against payment of its full value, and that, if the captain of a vessel stopped for carrying contraband should deliver up all contraband, the vessel should at once be set free. I doubt whether any other treaty of the same kind was entered into by either Prussia or the United States.<sup>3</sup>

<sup>1</sup> See Wheaton, *Histoire des Progrès du Droit des gens en Europe* (1841), p. 82.

<sup>2</sup> Martens, *R.I.*, IV. 42. The stipulation was renewed by article 12 of the Treaty of Commerce and Navigation between the two States concluded in 1828; Martens, *N.R.*, VII. 619.

<sup>3</sup> Article 12 of the Treaty of Commerce, between the United States of America and Italy, signed at Florence on February 26,

1871—see Martens, *N.R.G.*, 2nd ser. I. p. 57—stipulates immunity from seizure of such private property only as does not consist of contraband: "The high contracting parties agree that, in the unfortunate event of war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by

And it is certain that, if any rule regarding penalty for carriage of contraband is generally recognised at all, it is the rule that contraband goods can be confiscated.<sup>1</sup> But there always remains the difficulty that it is controverted what articles are contraband, and that the practice of States varies much regarding the question how far the vessel herself and innocent cargo carried by her can be confiscated. For beyond the rule that absolute contraband can be confiscated, there is no unanimity regarding the fate of the vessel and the innocent part of the cargo. Great Britain and the United States of America confiscate the vessel when the owner of the contraband is also the owner of the vessel; they also confiscate such part of the innocent cargo as belongs to the owner of the contraband goods; they, lastly, confiscate the vessel, although her owner is not the owner of the contraband, provided he knew of the fact that his vessel was carrying contraband, or provided the vessel sailed with false or simulated papers for the purpose of carrying contraband.<sup>2</sup> Some States allow such vessel carrying contraband as is not herself liable to confiscation to proceed with her voyage on delivery of her contraband goods to the seizing cruiser,<sup>3</sup> but Great Britain<sup>4</sup> and other States insist upon the vessel being brought before a Prize Court in every case.

§ 406. Those States which make a distinction

the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party." See above, § 178.

<sup>1</sup> But if a vessel carrying con-

traband sailed before the outbreak of war and is seized before she acquired knowledge of the war, confiscation ought not to take place. See Perels, § 46, p. 252.

<sup>2</sup> See Holland, Prize Law, §§ 82-87.

<sup>3</sup> See Calvo, V. § 2779.

<sup>4</sup> See Holland, Prize Law, § 81.

Pre-emption of Conditional Contraband.

between absolute and conditional contraband regularly confiscate neither the conditional contraband nor the vessel that carries it, but they seize the former and pay for it. According to British practice,<sup>1</sup> freight is paid to the vessel, and for the conditional contraband the usual compensation is the cost price *plus* 10 per cent. profit. States acting thus maintain a right to confiscate conditional contraband but they exercise pre-emption in mitigation of such right. Those Continental writers who refuse to recognise the existence of conditional contraband deny, consequently, that there is a right to confiscate articles not absolutely contraband, but they maintain that every belligerent has, according to the so-called right of angary,<sup>2</sup> a right to stop all such neutral vessels as carry provisions and other goods with a hostile destination of which he can make use and to seize such goods against payment of their full value.

The Institute of International Law, whose rules regarding contraband, adopted at its meeting at Venice in 1896, restrict contraband to arms, ammunition, articles of military equipment, vessels fitted for naval operations, and instruments for the immediate fabrication of ammunition, contain a compromise regarding articles of ancipitous use. Although these rules say that those articles cannot be considered contraband, they give nevertheless the choice to a belligerent either of exercising pre-emption or of seizing and temporarily detaining them against payment of indemnities.<sup>3</sup>

<sup>1</sup> See Holland, *Prize Law*, § 84. Great Britain likewise exercises pre-emption instead of confiscation with regard to such absolute contraband as is in an un-

the same time the produce of the country exporting it.

<sup>2</sup> See above, § 367.

<sup>3</sup> It is of value to print here the "Réglementation internationale de la contrebande de

guerre" adopted by the Institute of International Law (Annuaire, XV. [1896] p. 230):—

§ 1. Sont articles de contrebande de guerre: (1) les armes de toute nature; (2) les munitions de guerre et les explosifs; (3) le matériel militaire (objets d'équipement, affûts, uniformes, etc.); (4) les vaisseaux équipés pour la guerre; (5) les instruments spécialement faits pour la fabrication immédiate des munitions de guerre; lorsque ces divers objets sont transportés par mer pour le compte ou à la destination d'un belligérant.

La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale.

§ 2. Sous la dénomination de *munitions de guerre* doivent être compris les objets qui, pour servir immédiatement à la guerre, n'exigent qu'une simple réunion ou juxtaposition.

§ 3. Un objet ne saurait être qualifié de contrebande à raison de la seule intention de l'employer à aider ou favoriser un ennemi, ni par cela seul qu'il pourrait être,

dans un but militaire, utile à un ennemi ou utilisé par lui, ou qu'il est destiné à son usage.

§ 4. Sont et demeurent abolies les prétendues contrebandes désignées sous les noms soit de contrebande *relative*, concernant des articles (*usus ancipitis*) susceptibles d'être utilisés par un belligérant dans un but militaire, mais dont l'usage est essentiellement pacifique, soit de contrebande *accidentelle*, quand lesdits articles ne servent spécialement aux buts militaires que dans une circonstance particulière.

§ 5. Néanmoins le belligérant a, à son choix et à charge d'une équitable indemnité, le droit de séquestre ou de préemption quant aux objets qui, en chemin vers un port de son adversaire, peuvent également servir à l'usage de la guerre et à des usages pacifiques.

§ 9. En cas de saisies ou répressions non justifiées pour cause de contrebande ou de transport, l'Etat du capteur sera tenu aux dommages-intérêts et à la restitution des objets.

§ 10. Un transport parti avant la déclaration de la guerre et sans connaissance obligée de son imminence n'est pas punissable.

## CHAPTER V

### ANALOGOUS OF CONTRABAND

#### I

#### CARRIAGE OF PERSONS AND DESPATCHES FOR THE ENEMY

Hall, §§ 248-253—Lawrence, §§ 282-284—Phillimore, III. §§ 271-274—Halleck, II. pp. 289-301—Taylor, §§ 667-673—Walker, § 72—Wharton, III. § 374—Wheaton, §§ 502-504 and Dana's note No. 228—Bluntschli, §§ 815-818—Heffter, § 161A—Geffcken in Holtzendorff, IV. pp. 731-738—Ullmann, § 165—Bonfilis, Nos. 1584-1588—Despagnet, No. 691—Rivier, II. pp. 388-391—Calvo, V. §§ 2796-2820—Fiore, III. Nos. 1602-1605—Martens, II. § 136—Kleen, I. §§ 103-106—Boeck, Nos. 660-669—Pillet, p. 330—Gessner, pp. 99-111—Perels, § 47—Testa, p. 212—Dupuis, Nos. 231-238—Holland, Prize Law, §§ 88-105—U.S. Naval War Code, articles 16 and 20—Hautefeuille, II. pp. 173-188—Ortolan, II. pp. 209-213—Mountague Bernard, "Neutrality of Great Britain during the American Civil War" (1870), pp. 187-205—Marquardsen, "Der Trent-Fall" (1862), pp. 58-71—Hirsch, "Kriegsakontrebande und verbotene Transporte in Kriegszeiten" (1897), pp. 42-55—Takahashi, "International Law during the Chino-Japanese War" (1899), pp. 52-72—Vetzel, "De la contrebande par analogie en droit maritime internationale" (1901).—See also the monographs quoted above at the commencement of § 391.

Carriage  
of certain  
Enemy  
Persons  
and Des-  
patches  
analogous  
of Con-  
traband.

§ 407. Carriage of certain persons and despatches for the enemy is often confounded with carriage of contraband. Since, however, contraband consists of certain goods only, and never of persons or despatches, a vessel carrying persons and despatches for the enemy ought not to be considered carrying contraband. And there is another important difference between the two. Carriage of contraband need not

necessarily, and in most cases actually does not, take place in the direct service of the enemy. On the other hand, carriage of persons and despatches for the enemy always takes place in the direct service of the enemy, and, consequently, represents a much more intensive assistance of, and a much more intimate connection with, the enemy than carriage of contraband. Taking this into consideration, some writers<sup>1</sup> entirely severed the treatment of contraband and of carriage of persons and despatches for the enemy, and they treat of the maritime transport of persons and despatches for the enemy under the head of "un-neutral services." But although this distinct treatment is certainly desirable, the term "un-neutral services" is misleading. Moreover, it is a fact that in practice maritime transport for the enemy is treated in analogy with, although not as, carriage of contraband. The term "analogous of contraband" had therefore better be made use of.<sup>2</sup>

§ 408. Either belligerent can punish neutral vessels for carrying certain persons to and from the enemy territory. Such persons are, firstly and chiefly, members of the armed forces who are either brought to the region of war, where they are intended to take part in the fighting, or are carried away from the region of war for any purpose.<sup>3</sup> Such persons are, secondly, individuals who are not yet, but will become members of the armed forces as soon as they have reached the place of their destination. Such persons

Carriage  
of Persons  
for the  
Enemy.

<sup>1</sup> See, for instance, Lawrence, § 282, and Taylor, § 667.

<sup>2</sup> Although—see above, §§ 173-174—prevention of carriage of analogous of contraband is a means of sea-warfare, it chiefly concerns neutral commerce, and is, therefore, more conveniently treated together with neutrality.

<sup>3</sup> But according to article 6 of the Hague "Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention," neutral merchantmen cannot be captured for taking on board sick, wounded, or shipwrecked marines of the enemy. See above, § 208.

are, thirdly and lastly, non-military individuals in the service of the enemy either of such a prominent position that they can be made prisoners of war, or going abroad as agents for the purpose of fostering the cause of the enemy by buying arms and ammunition, by endeavouring to procure the intervention of a third Power, or by other means. Thus, for instance, if the head of a belligerent State or one of his Cabinet Ministers flees the country to avoid captivity, the neutral vessel that carries him off may be punished, as may also the vessel carrying an agent of the enemy sent abroad to negotiate a loan, and the like.

However, the mere fact that enemy persons are on board of a neutral vessel does not in itself prove that these persons are carried by the vessel *for the enemy and in his service*. This is the case only if either the vessel knows of the character of the persons and nevertheless carries them, thereby acting in the service of the enemy, or if the vessel is directly hired by the enemy for the purpose of transport of the individuals concerned. Thus, for instance, if able-bodied men book their passage on a neutral vessel to an enemy port with the secret intention of enlisting in the forces of the enemy, the vessel cannot be considered carrying persons for the enemy; but she can be so considered if an agent of the enemy openly books their passage. Thus, further, if the fugitive head of the enemy State books his passage under a false name, and conceals his identity from the vessel, she cannot be considered carrying a person for the enemy; but she can be so considered if she knows whom she is carrying, because she knows then that she is acting in the service of the enemy. As regards a vessel directly hired by the enemy, there

can be no doubt that she is acting in the service of the enemy. Thus the American vessel "Orozembo"<sup>1</sup> was in 1807, during war between England and the Netherlands, captured and condemned, because, although chartered by a merchant in Lisbon ostensibly to sail in ballast to Macao and to take from there a cargo to America, she received by order of the charterer three Dutch officers and two Dutch civil servants, and sailed, not to Macao, but to Batavia. And the American vessel "Friendship"<sup>2</sup> was likewise in 1807, during war between England and France, captured and condemned, because she was hired by the French Government to carry ninety shipwrecked officers and sailors home to a French port.

According to British practice a neutral vessel is considered as carrying persons in the service of the enemy even if she was, through the application of force, constrained by the enemy to carry the persons or if she was in *bond-fide* ignorance of her passengers. Thus, in 1802, during war between Great Britain and France, the Swedish vessel "Carolina"<sup>3</sup> was condemned by Sir William Scott for having carried French troops from Egypt to Italy, although the master endeavoured to prove that the vessel was obliged by force to render the transport service. And the above-mentioned vessel "Orozembo" was condemned by Sir William Scott, although her master was ignorant of the service for the enemy on which he was engaged: ". . . In cases of *bond-fide* ignorance there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from

<sup>1</sup> 6 Rob. 430.

<sup>2</sup> 6 Rob. 420.

<sup>3</sup> 4 Rob. 256.



being done, or at least repeated, by enforcing the penalty of confiscation," said Sir William Scott.<sup>1</sup>

Carriage  
of Diplo-  
matic  
Persons  
for the  
Enemy  
(Case  
of the  
"Trent.")

§ 409. It must be specially observed that diplomatic agents sent by the enemy to a neutral State make an exception to the rule that neutral vessels may be punished for carrying agents sent by the enemy. The reason is that neutrals have, as shown above in § 319, a right to demand that their intercourse with either belligerent shall not be suppressed, and that the sending and receiving of diplomatic agents is necessary for such intercourse.<sup>2</sup> The importance of this exception became apparent during the Civil War in America. On November 8, 1861, the Federal cruiser "San Jacinto" stopped the British mail steamer "Trent" on her voyage from Havana to the British port of Nassau, in the Bahamas, forcibly took off Messrs. Mason and Slidell, together with their secretaries, political agents sent by the Confederate States to Great Britain and France, and then let the vessel continue her voyage. Great Britain demanded their immediate release, and the United States at once granted this, although the ground on which release was granted was not identical with the ground on which release was demanded. The Government of the United States maintained that the removal of these men from the vessel without bringing her before a Prize Court for trial was irregular, and, therefore,

<sup>1</sup> See Phillimore, III. § 274, and Holland, Prize Law, §§ 90-91. Hall, § 249, p. 700, note 2, reproaches the British practice. During the Russo-Japanese War only one case of condemnation of a neutral vessel for carrying persons for the enemy is recorded, that of the "Nigretia," a vessel which endeavoured to carry into Vladivostock the escaped captain and lieutenant of the

Russian destroyer "Ratzoporni"; see Holland, Neutral Duties in a Maritime War, as illustrated by Recent Events (1905), p. 12.

<sup>2</sup> This, however, does not prevent a belligerent from capturing and retaining as prisoner of war such diplomatic envoy of the enemy as is found on his own or on enemy territory or on his own or on enemy vessels. See above, § 117, and vol. I. § 398.

not justified, whereas release was demanded on the ground that a neutral vessel could not be prevented from carrying diplomatic agents sent by the enemy to neutrals. Now, diplomatic agents in the proper sense of the term these gentlemen were not, because, although they were sent by the Confederate States, the latter were not recognised as such, but only as a belligerent Power.<sup>1</sup> Yet these gentlemen were political agents of a quasi-diplomatic character, and the standpoint of Great Britain was for this reason perhaps correct. The fact that the Governments of France, Austria, and Prussia protested through their diplomatic envoys in Washington shows at least that neutral vessels may carry unhindered diplomatic agents sent by the enemy to neutrals, however doubtful it may be whether the same is valid regarding agents with a quasi-diplomatic character.<sup>2</sup>

§ 410. Either belligerent can punish neutral merchantmen for carrying political despatches from or to the enemy, and especially such as are in relation to the war. But to this rule there is an exception, on the ground that neutrals have a right to demand that their intercourse with either belligerent be not suppressed. A neutral vessel cannot be punished for carrying despatches from the enemy to neutral Governments, and *vice versa*,<sup>3</sup> and, further, despatches from the enemy Government to its diplomatic agents and consuls abroad in neutral States and *vice versa*.<sup>4</sup> But it must be specially observed that despatches

Carriage  
of De-  
spatches  
for the  
Enemy.

<sup>1</sup> That insurgents who are recognised as a belligerent Power can send political but not diplomatic agents was shown above, vol. I. § 362.

<sup>2</sup> See Parliamentary Papers, 1862, North America, N. 5; Marquandsen, Der Trent Fall (1862);

Wharton, § 374; Phillimore, II. §§ 130-130A; Mountague Bernard, Neutrality of Great Britain during the American Civil War (1870), pp. 187-205; Harris, The Trent Affair (1896).

<sup>3</sup> The Caroline, 6 Rob. 461.

<sup>4</sup> The Madison, Edwards, 224.

from the enemy Government to political agents abroad without diplomatic character, and *vice versa*, are not privileged, nor are despatches between a belligerent and his ally.

However, the mere fact that a neutral vessel has political despatches to or from the enemy on board does not by itself prove that she is carrying them *for and in the service of the enemy*. Just as in the case of certain enemy persons on board, so in the case of despatches, the vessel is only considered carrying them in the service of the enemy if either she knew of their character and has nevertheless taken them on board, or she was directly hired for the purpose of carrying them. Thus, the American vessel "Rapid,"<sup>1</sup> which was captured in 1810 during the war between Great Britain and the Netherlands, on her voyage from New York to Tonningen, for having on board a despatch for a Cabinet Minister of the Netherlands hidden under a cover addressed to a merchant at Tonningen, was released by the Prize Court. On the other hand, the "Atalanta,"<sup>2</sup> which carried despatches in a tea chest hidden in the trunk of a supercargo, was condemned.<sup>3</sup>

Several writers<sup>4</sup> assert an exception to the rule in favour of packets of a regular mail line and of vessels of a similar kind which have, according to International conventions and municipal regulations, to accept for transport all letters and parcels delivered to them by the post offices of the ports at which they

<sup>1</sup> Edwards, 228.

<sup>2</sup> 6 Rob. 440.

<sup>3</sup> British practice seems unsettled on the question whether the vessel must know of the character of the despatch which she is carrying. In spite of the case of the "Rapid," quoted above,

Holland, Prize Law, § 100, maintains that ignorance of the master of the vessel is no excuse, and Phillimore, III. § 272, seems to be of the same opinion.

<sup>4</sup> See, for instance, Calvo, V. § 2808, and Hall, § 252.

call. But I am not sure that a rule regarding this exception is universally recognised by custom.<sup>1</sup>

## II

### CONSEQUENCES OF CARRIAGE OF PERSONS AND DESPATCHES FOR THE ENEMY

See the literature quoted above at the commencement of § 407.

§ 411. It is generally recognised by theory and practice that a neutral vessel carrying persons and despatches for the enemy may be captured on the Open Sea and in the territorial maritime belt of either belligerent. Here, too, capture is allowed only as long as the vessel is *in delicto*,<sup>2</sup> that is, during the time from her departure with the persons or despatches up to the moment when she has brought them to the enemy. No seizure is, therefore, admissible on the return voyage. It must be specially observed that mail-steamers are on principle not exempt from capture for carriage of analogous of contraband. Nor are in strict law mail-bags of such steamers exempt from search in case the vessels are searched. But there is a tendency to create an alteration of the strict law. Thus, France, in 1870, during the Franco-German War, ordered her officers not to search the mail-bags of neutral mail-boats provided these vessels had an agent of the flag-State on board who asserted that no enemy despatches were in the bag. And § 17 of the "Règlement International des Prises maritimes," adopted by the Institute of International Law

Capture  
for  
carrying  
Persons  
and Des-  
patches  
for the  
Enemy.

<sup>1</sup> See below, § 411.

<sup>2</sup> Whether those Prize Courts which apply the doctrines of continuous voyages and of continuous transports to the carriage of contraband would apply them likewise to the carriage of analogous of contraband, may be doubted.

at its meeting at Heidelberg in 1887,<sup>1</sup> prohibits even visit to a neutral mail-boat if an agent of the flag-State is on board who declares in writing that no contraband, enemy troops, and enemy despatches are on board. During the American Civil War the United States, following a suggestion of Great Britain, ordered her officers in the case of the capture of such vessels as carried mail-bags not to open the latter, but to forward them to their address.<sup>2</sup> All these examples show that there is a tendency on the part of belligerents to pay a certain consideration to mail-bags, in spite of the rule in strict law that these bags are not privileged. But that this tendency has not yet altered the law is proved by the fact that during the Russo-Japanese War, on July 15, 1904, the Russian cruiser "Smolensk" stopped the German mail steamer "Prinz Heinrich" in the Red Sea and seized and examined her mail bags.<sup>3</sup>

Penalty  
for carry-  
ing Per-  
sons and  
Despatch-  
es for the  
Enemy.

§ 412. It is generally recognised that a neutral vessel captured for carriage of persons or despatches in the service of the enemy may be confiscated. Moreover, according to British<sup>4</sup> practice, such part of the cargo as belongs to the owner of the vessel is likewise confiscated.<sup>5</sup> There is no doubt that, if the vessel is not found guilty of carrying persons or despatches in the service of the enemy, and is, therefore, not condemned, the Government of the captor can nevertheless retain the persons as prisoners of war and confiscate the despatches, provided the

<sup>1</sup> See *Annuaire*, IX. (1887-88), p. 218. of the "Smolensk," see above, § 84.

<sup>2</sup> See Mountague Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 313-323. <sup>4</sup> *The Friendship*, 6 Rob. 420; *the Atalanta*, 6 Rob. 440. See *Holland, Prize Law*, §§ 95 and 105.

<sup>3</sup> See Lawrence, *War*, p. 195. <sup>5</sup> See, however, *the Hope*, 6 Rob. 463, note. As regards the irregular character

persons and despatches are of such character at all as to make a vessel cognisant of this character liable to punishment for transporting them for and in the service of the enemy.

§ 413. Whenever a neutral vessel is stopped for carrying persons or despatches in the service of the enemy, these persons and despatches cannot, at least according to British<sup>1</sup> and American practice, be seized unless the vessel is seized at the same time for the purpose of bringing her before a Prize Court. The release of Messrs. Mason and Slidell, forcibly taken off the "Trent" whilst the ship was allowed to continue her voyage, was based by the United States<sup>2</sup> on the fact that the seizure of these men without seizure of the vessel was illegal. Some writers,<sup>3</sup> however, maintain that a mail-boat carrying enemy despatches ought not to be seized, but ought to be stopped for the purpose of taking out the despatches, and then be allowed to continue her voyage.

Seizure of  
Enemy  
Persons  
and De-  
spatches  
without  
seizing  
the  
Vessel.

Quite different from the case of seizure of such enemy persons and despatches as a vessel may not carry unpunished in the service of the enemy is the case<sup>4</sup> where a vessel has such enemy persons and despatches on board as she is allowed to carry, but whom a belligerent believes it to be necessary in the interest of self-preservation to seize. Since necessity in the interest of self-preservation is, according to International Law, an excuse<sup>5</sup> for an illegal act, a belligerent can seize such persons and despatches, provided that such seizure is not only desirable, but absolutely necessary<sup>6</sup> in the interest of self-preservation.

<sup>1</sup> See Holland, Prize Law, § 104.

<sup>2</sup> See above, § 409.

<sup>3</sup> See, for instance, Rivier, II. p. 389, and Ullmann, § 165.

<sup>4</sup> See Hall, § 253; Rivier, II. p. 390.

<sup>5</sup> See above, vol. I. § 129.

<sup>6</sup> See above, vol. I. § 130.

as, for instance, in the case where an Ambassador of the enemy on board a neutral vessel is on the way to submit to a neutral a draft treaty of alliance injurious to the other belligerent.<sup>1</sup>

<sup>1</sup> It is of value to print here the rules of the Institute of International Law concerning analogous of contraband. They are rules 6-8 of the "Réglementation internationale de la contrebande de guerre," adopted in Venice in 1896. See *Annuaire*, XV. (1896) p. 230 :—

§ 6. Il est défendu d'attaquer ou empêcher le transport de diplomates ou courriers diplomatiques : 1° neutres ; 2° accrédités auprès de gouvernements neutres ; 3° naviguant sous pavillons neutres entre des ports neutres ou entre un port neutre et le port d'un belligérant.

Au contraire, le transport des diplomates d'un ennemi accrédités auprès de son allié est, sauf le trafic régulier et ordinaire, interdit : 1° sur les territoires et eaux des belligérants ; 2° entre leurs possessions ; 3° entre les belligérants alliés.

§ 7. Sont interdits les transports de troupes, militaires ou agents de guerre d'un ennemi : 1° dans les eaux des belligérants ; 2° entre leurs autorités, ports, possessions, armées ou flottes ; 3° lorsque le transport se fait pour le compte ou

par l'ordre ou le mandat d'un ennemi ; ou bien pour lui amener soit des agents avec une commission pour les opérations de la guerre, soit des militaires étant déjà à son service ou des troupes auxiliaires ou enrôlées contrairement à la neutralité,—entre ports neutres, entre eaux d'un neutre et ceux d'un belligérant, d'un point neutre à l'armée ou la flotte d'un belligérant.

L'interdiction ne s'étend pas au transport des particuliers qui ne sont pas encore au service militaire d'un belligérant, lors même qu'ils auraient l'intention d'y entrer, ou qui font le trajet comme simples voyageurs sans connexité manifeste avec le service militaire.

§ 8. Entre deux autorités d'un ennemi, qui se trouvent sur quelque territoire ou navire lui appartenant ou occupé par lui, est interdit, sauf le trafic régulier et ordinaire, le transport de ses dépêches (communications officielles entre autorités officielles).

L'interdiction ne s'étend pas aux transports soit entre ports neutres soit en provenance ou à destination de quelque territoire ou autorité neutre.

## CHAPTER VI

### VISITATION, CAPTURE, AND TRIAL OF NEUTRAL VESSELS

#### I

#### VISITATION

Vattel, III. § 114—Hall, §§ 270-276—Lawrence, pp. 210, 211, 268—Manning, pp. 433-460—Phillimore, III. §§ 322-344—Twiss, II. §§ 91-97—Halleck, II. pp. 255-271—Taylor, §§ 685-689—Wharton, III. §§ 325 and 346—Wheaton, §§ 524-537—Bluntschli, §§ 819-826—Heffter, §§ 167-171—Geffcken in Holtzendorff, IV. pp. 773-781—Klüber, §§ 293-294—G. F. Martens, II. §§ 317 and 321—Ullmann, § 168—Bonfilis, Nos. 1674-1675—Despagnet, Nos. 693-695—Rivier, II. pp. 423-426—Calvo, V. §§ 2939-2991—Fiore, III. Nos. 1630-1641—Martens, II. § 137—Kleen, II. §§ 185-199, 209—Gessner, pp. 278-332—Boeck, Nos. 767-769—Dupuis, Nos. 239-252—Perels, §§ 52-55—Testa, pp. 230-242—Ortolan, II. pp. 214-245—Hautefeuille, III. pp. 1-299—Holland, Prize Law, §§ 1-17, 155-230—U.S. Naval War Code, articles 30-33—Schlegel, "Sur la visite des vaisseaux neutres sous convoi" (1800)—Mirbach, "Die völkerrechtlichen Grundsätze des Durchsuchungsrechts zur See" (1903)—Loewenthal, "Das Untersuchungsrecht des internationalen Seerechts im Krieg und Frieden" (1905)—Duboc in R.G., IV. (1897), pp. 382-403.—See also the monographs quoted above at the commencement of § 391, and Bulmerincq's articles on "Le droit des prises maritimes" in R.I., X-XIII. (1878-1881).

§ 414. Right of visitation<sup>1</sup> is the right of belligerents to visit and eventually search neutral merchantmen for the purpose of ascertaining whether these

Concep-  
tion of  
Right of  
Visitation.

<sup>1</sup> It must be borne in mind that this right of visitation is not an independent right but is involved in the right of either belligerent—see above, § 314—to punish neutral vessels breaking blockade and carrying contraband and analogous of contraband.



vessels really belong to the merchant marine of neutrals, and, if this is found to be the case, whether they are attempting to break a blockade, or whether they carry contraband or analogous of contraband or public enemy property. The right of visit and search is already mentioned in the *Consolato del Mare*, and although it has often<sup>1</sup> been contested, its *raison d'être* is so obvious that it is now generally recognised in theory and universally in practice. It is indeed the only means for belligerents to ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him services of maritime transport.<sup>2</sup>

Right of  
Visitation  
by whom,  
when, and  
where  
exercised.

§ 415. The right of visit and search can be exercised by all warships<sup>3</sup> of belligerents. But since it is a belligerent right, it can, of course, only be exercised after the outbreak of war and before the end of war. The right of visitation on the part of men-of-war of all nations in time of peace in a case of suspicion of piracy—see above, vol. I. § 266 (2)—has nothing to do with the right of visit and search on the part of belligerents. And since an armistice does not bring war to an end, and since, on the other hand, the exercise of the right of visitation is not an act of warfare, this right can be exercised during the time of a partial as well as of a general armistice.<sup>4</sup> The

<sup>1</sup> See, for instance, Hübner, *De la saisie des bâtiments neutres*, (1759), I. p. 227.

<sup>2</sup> Attention should be drawn to the "Règlement International des prises maritimes," adopted at Heidelberg in 1887 by the Institute of International Law; §§ 1-29 regulate visit and search. See *Annuaire*, IX. (1888), p. 202.

<sup>3</sup> It should be mentioned that privateers can also exercise the right of visit and search. But

since even such States as have not acceded to the Declaration of Paris in practice no longer issue Letters of Marque, such a case will hardly occur.

<sup>4</sup> But this is not universally recognised. Thus, Hautefeuille, III. p. 91, maintains that during a general armistice the right of visitation cannot be exercised, and § 5 of the "Règlement International des prises maritimes" of the Institute of International

region where the right can be exercised is the maritime territorial belt of either belligerent, and, further, the Open Sea, but not the maritime territorial belt of neutrals. Whether the part of the Open Sea in which a belligerent man-of-war meets with a neutral merchantman is near or far away from that part of the world where actually hostilities are taking place matters not at all as long as there is suspicion against the vessel. The question whether the men-of-war of a belligerent can exercise the right of visitation in the maritime territorial belt of an ally is one between the latter and the belligerent exclusively, provided such an ally is already a belligerent.

§ 416. During the nineteenth century it has become universally recognised that neutral men-of-war are not objects of the right of visit and search of belligerents.<sup>1</sup> And the same is valid regarding public neutral vessels which sail in the service of armed forces, such as transport vessels for instance. Doubt exists as to the position of public neutral vessels which do not sail in the service of armed forces, but, such as mail-boats belonging to a neutral State for instance, sail for other purposes. It is asserted<sup>2</sup> that, if they are commanded by an officer of the Navy, they must be treated in the same way as men-of-war, but that it is desirable to ask the commanders to give their word of honour assuring the absence of contraband and analogous of contraband.

§ 417. Sweden in 1653, during war between

Only  
Private  
Vessels  
can be  
visited.

Vessels  
under  
Convoy.

Law takes up the same attitude. It ought, likewise, to be mentioned that in strict law the right of visit and search can be exercised even after the conclusion of peace before the treaty of peace is ratified. But the above-mentioned § 5 of the "Règlement international des

prises maritimes" declares this right to cease "avec les préliminaires de la paix." See below, § 436.

<sup>1</sup> In former times Great Britain tried to extend visitation to neutral men-of-war. See Manning, p. 455.

<sup>2</sup> See, for instance, Gessner, p. 297, and Perels, § 52, IV.

Great Britain and the Netherlands, claimed that the belligerents ought to waive their right of visitation over Swedish merchantmen if the latter sailed under the convoy of a Swedish man-of-war whose commander asserted the absence of contraband on board the convoyed vessels. The Peace of Westminster in 1654 brought this war to an end, and in 1756 the Netherlands, now neutral, claimed the right of convoy. But it was not before the last quarter of the eighteenth century that the right of convoy was more and more insisted upon by Continental neutrals. During the American War of Independence in 1780, the Netherlands again claimed that right, and when they themselves in 1781 waged war against Great Britain, they ordered their men-of-war and privateers to respect the right of convoy. Between 1780 and 1800 treaties were concluded, in which Russia, Austria, Prussia, Denmark, Sweden, France, the United States of America, and other States recognised that right. But Great Britain always refused to recognise it, and in July 1800 the action of a British squadron in capturing a Danish man-of-war and her convoy of six merchantmen for resistance to visitation called the Second Armed Neutrality into existence.<sup>1</sup> Yet Great Britain still resisted, and by Article 4 of the "Maritime Convention" of St. Petersburg of June 17, 1801, she conceded to Russia only that vessels under convoy should not be visited by privateers. During the nineteenth century more and more treaties stipulating the right of convoy were concluded, so that it may be maintained that this right is now pretty generally<sup>2</sup> recognised. But Great

<sup>1</sup> See above, § 290.

<sup>2</sup> U. S. Naval War Code, article 30, recognises it likewise, in con-

formity with the constant practice of the United States in the past.

Britain has never altered her attitude, and, since the Declaration of Paris of 1856 does not mention convoy at all, the recognition of the right of convoy cannot be enforced upon Great Britain against her will.

§ 418. There are no rules of International Law which lay down all the details of the formalities of the mode of visitation. A great many treaties regulate them as between the parties, and all maritime nations have given instructions to their men-of-war regarding these formalities. Thereby uniform formalities are practised with regard to many points, but regarding others the practice of different States differs. Article 17 of the Peace Treaty of the Pyrenees of 1659 has served as a model of many of the mentioned treaties regulating the formalities of visitation: "Les navires d'Espagne, pour éviter tout désordre, n'approcheront pas de plus près les Français que la portée du canon, et pourront envoyer leur petite barque ou chaloupe à bord des navires français et faire entrer dedans deux ou trois hommes seulement, à qui seront montrés les passeports par le maître du navire français, par lesquels il puisse apparoir, non seulement de la charge, mais aussi du lieu de sa demeure et résidence, et du nom tant du maître ou patron que du navire même, afin que, par ces deux moyens, on puisse connaître, s'il porte des marchandises de contrebande; et qu'il apparaisse suffisamment tant de la qualité du dit navire que de son maître ou patron; auxquelles passeports on devra donner entière foi et créance."

No  
Universal  
Rules  
regarding  
Mode of  
Visitation.

§ 419. A man-of-war which wishes to visit a neutral vessel must stop her or make her bring to. Although the chasing of vessels may take place under false colours, the right colours must be shown

Stopping  
of Vessels  
for the  
Purpose of  
Visitation.

when vessels are stopped.<sup>1</sup> The order for stopping can be given<sup>2</sup> by hailing or by firing one or two blank cartridges from the so-called affirming gun, and, if necessary, by firing a shot across the bows of the vessel. If nevertheless the vessel does not bring to, the man-of-war is justified in using force to compel her to bring to. Once the vessel has been brought to, the man-of-war brings to on her part, keeping a reasonable distance. With regard to the width of this distance, treaties very often stipulate either the range of a cannon shot or half such width or even a range beyond a cannon shot; but all this is totally impracticable.<sup>3</sup> The distance must vary according to the requirements of the case, and according to wind and weather.

Visit.

§ 420. The vessel, having been stopped or brought to, is visited<sup>4</sup> by one or two officers sent in a boat from the man-of-war. These officers examine the papers of the vessel to ascertain her nationality, the character of her cargo and passengers, and, lastly, the ports from and to which she is sailing. Instead of visiting the merchantman and inspecting her papers on board, the practice is followed, by the men-of-war of some States, of summoning the master of the merchantman with his papers on board the former and examining the papers there.

If everything is found in order and there is no suspicion of fraud, the vessel is allowed to continue her course, a memorandum of the visit having been entered in her log-book. On the other hand, if the inspection of the papers shows that the vessel is carrying contraband or analogous of contraband,

<sup>1</sup> See above, § 211.

Perels, § 53, pp. 284, 285.

<sup>2</sup> See above, vol. I. § 268.

<sup>4</sup> See above, vol. I. § 268, and

<sup>3</sup> See Ortolan, II. p. 220, and Holland, Prize Law, §§ 195-216.

or that she is for another reason liable to capture, she is at once seized. But it may be that, although ostensibly everything is in order, there is nevertheless grave suspicion of fraud against the vessel. In such case she may be searched.

§ 421. Search is effected<sup>1</sup> by one or two officers, Search. and eventually a few men, in presence of the master of the vessel. Care must be taken not to damage the vessel or the cargo, and no force whatever must be applied. No lock must be forcibly broken open by the search party, but the master is to be required to unlock it. If he fails to comply with the demand he is not to be forced thereto, since the master's refusal to assist the search in general, or that of a locked part of the vessel or of a locked box in particular, is already sufficient cause for seizing the vessel. Search being completed, everything removed has to be replaced with care. If the search has satisfied the searching officers and dispelled all suspicion, a memorandum is entered in the log-book of the vessel, and she is allowed to continue her voyage. On the other hand, if search brought contraband or another cause for capture to light, the vessel is seized. But since search on the sea can never take place so thoroughly as in a harbour, it may be that, although search has disclosed no proof to bear out the suspicion, grave suspicion still remains. In such case she may be seized and brought into a port for the purpose of being searched there as thoroughly as possible. But the commander of a man-of-war seizing a vessel in such case must bear in mind that full indemnities must be paid to the vessel for loss of time and other losses sustained if finally she is found

<sup>1</sup> See above, vol. I. § 269, and Holland, Prize Law, §§ 217-230.

innocent. Therefore, after a search has brought nothing to light against the vessel, seizure should take place only in case of grave suspicion.

Consequences  
of Resistance to  
Visitation.

§ 422. If a neutral merchantman resists visit or search, she is at once captured. No visit and search take place at all after capture, because confiscation is already the penalty for resistance, whether the vessel is or is not liable to be confiscated on other grounds. The question whether the vessel only or also her cargo can be confiscated for resistance is controverted. According to British<sup>1</sup> and American theory and practice, the cargo is likewise confiscated. But Continental<sup>2</sup> writers emphatically argue against this and maintain that the vessel only is liable to confiscation.

What constitutes  
Resistance.

§ 423. Theory and practice agree that mere flight, mere attempt on the part of a neutral merchantman to escape visitation, does not in itself constitute resistance.<sup>3</sup> But, of course, such vessel may be chased and compelled by force to bring to; some<sup>4</sup> States even order their men-of-war to capture vessels attempting to escape visitation. But it constitutes resistance if a vessel defends herself by force against a man-of-war which endeavours to make her bring to, or if a vessel which has been brought to refuses to admit the visiting officer on board, or refuses to show her papers, or to submit to search. It also constitutes resistance if the master refuses to be present during search, or to open locked parts of the vessel, locked boxes, and the like.

Sailing under  
Enemy  
Convoy  
equivalent  
to Resistance.

§ 424. Wheaton excepted, all writers would seem to agree that the fact of neutral merchantmen's

<sup>1</sup> The Maria, 1 Rob. 340.

<sup>2</sup> See Gessner, pp. 318-321.

<sup>3</sup> The Maria, 1 Rob. 340.

<sup>4</sup> See U.S. War Code, article 33 (1).

sailing under a convoy of enemy men-of-war is equivalent to resistance on their part, whether they themselves intend to resist by force or not. But the Government of the United States of America in 1810 contested this principle. In that year, during war between Great Britain and Denmark, many American vessels sailing from Russia used to seek protection under the convoy of British men-of-war, whereupon Denmark declared all such American vessels to be good and lawful prizes. Several were captured without making any resistance whatever, and were condemned by Danish Prize Courts. The United States protested, and claimed indemnities from Denmark, and in 1830 a treaty between the parties was signed at Copenhagen,<sup>1</sup> according to which Denmark had to pay 650,000 dollars as indemnity. But in article 5 of this treaty the parties "expressly declare that the present convention is only applicable to the cases therein mentioned, and, having no other object, can never hereafter be invoked by one party or the other as a precedent or a rule for the future."<sup>2</sup>

§ 425. Since Great Britain has never recognised the right of convoy and has always insisted upon the right of visitation to be exercised over neutral merchantmen sailing under the convoy of neutral men-

Resist-  
ance by  
Neutral  
Convoy.

<sup>1</sup> Martens, N.R., VIII. p. 350.

<sup>2</sup> See Wheaton, §§ 530-537 and Taylor, § 693, p. 790. Wheaton was the negotiator of this treaty on the part of the United States. With the case of neutral merchantmen sailing under enemy convoy, the other case—see above, § 185—is frequently confused, in which neutral goods are placed on board an armed enemy vessel. In the case of the "Fanny" (1 Dodson, 443) Sir William Scott condemned neutral Portuguese

property on the ground that placing neutral property on board an armed vessel was equal to resistance against visitation. But the Supreme Court of the United States of America, in the case of the "Nereide" (9 Cranch, 388), held the contrary view. The Court was composed of four judges of whom Story was one, and the latter dissented from the majority and considered the British practice correct. See Phillimore, III. § 341, and Wheaton, § 529.



of-war, the question has arisen whether such merchantmen are considered resisting visitation in case the convoying men-of-war only, and not the convoyed vessels themselves, offer resistance. British practice answers the question in the affirmative. The rule was laid down in 1799<sup>1</sup> and in 1804<sup>2</sup> by Sir William Scott in the cases of Swedish vessels captured while sailing under the convoy of a Swedish man-of-war.

Deficiency  
of Papers.

§ 426. Since the purpose of visit is to ascertain the nationality of the vessel, the character of her cargo and passengers, and the ports from and to which she is sailing, it is obvious that this purpose cannot be realised in case the visited vessel is deficient in her papers. As stated above in vol. I. § 262, every merchantman ought to carry the following papers: (1) A certificate of registry or a sea-letter (passport); (2) the muster-roll; (3) the log-book; (4) the manifest of cargo; (5) bills of lading, and (6) if chartered, the charter-party. Now, if a vessel is visited and cannot produce one or more of the mentioned papers, she is suspect. Search is, of course, admissible for the purpose of verifying the suspicion, but it may be that, although search has not produced any proof of guilt, the suspicion is not dispelled. In such case she may be seized and brought to a port for thorough examination. But, with the exception of the case that she cannot produce either certificate of registry or a sea-letter (passport), she cannot be confiscated for deficiency in papers only. Yet, if the cargo is also suspect, or if there are other circumstances which increase the suspicion, confiscation is in the discretion of the Prize Court.

§ 427. Mere deficiency of papers does not arouse

<sup>1</sup> *The Maria*, 1 Rob. 340.

<sup>2</sup> *The Elsebe*, 5 Rob. 173.

the same suspicion which a vessel incurs if she destroys<sup>1</sup> or throws overboard any of her papers, defaces them or conceals them, and in especial in case the spoliation of papers takes place at the time when the visiting vessel comes in sight. Whatever her cargo may be, a vessel may at once be seized without further search as soon as it becomes apparent that spoliation, defacement, or concealment of papers has taken place. The practice of the different States differs with regard to other consequences of spoliation, and the like, of papers, but confiscation is certainly admissible in case other circumstances increase the suspicion.<sup>2</sup>

Spolia-  
tion, De-  
facement,  
and Con-  
cealment  
of Papers.

§ 428. The highest suspicion is roused through the fact that a visited vessel carries double papers, or false<sup>3</sup> papers, and such vessel may certainly be seized. But the practice of the different States differs with regard to the question whether confiscation is admissible for the mere fact of carrying double or false papers. Whereas the practice of some States, as Russia and Spain, answers the question in the affirmative, British<sup>4</sup> and American<sup>5</sup> practice takes a more lenient view, and condemns such vessels only on a clear inference that the false or double papers were carried for the purpose of deceiving the belligerent by whom the capture was made, but not in other cases.<sup>6</sup>

Double  
and False  
Papers.

<sup>1</sup> The Hunter, 1 Dodson, 480.

<sup>2</sup> The St. Nicholas, 1 Wheaton

<sup>3</sup> See the case of The Apollo in 417.

Calvo, V. § 2989.

<sup>4</sup> See Halleck, II. p. 271; Hall, § 276; Taylor, § 690.

<sup>5</sup> The Sarah, 3 Rob. 330.

<sup>6</sup> The Eliza and Katy, 6 Rob. 192.

## II

### CAPTURE

Hall, § 277—Lawrence, § 215—Phillimore, III. §§ 361–364—Twiss, II. §§ 166–184—Halleck, II. pp. 362–391—Taylor, § 691—Bluntschli, § 860—Heffter, §§ 171, 191, 192—Geffcken in Holtzendorff, IV. pp. 777–780—Ullmann, § 168—Rivier, II. pp. 426–428—Calvo, V. §§ 3004–3034—Fiore, III. Nos. 1644–1657—Martens, II. §§ 126–137—Kleen, II. §§ 203–218—Gesener, pp. 333–356—Boeck, Nos. 770–777—Dupuis, Nos. 253–281—Perels, § 55—Testa, pp. 243–244—Hautefeuille, III. pp. 214–299—Holland, Prize Law, §§ 231–314—U.S. Naval War Code, articles 46–50—See also the monographs quoted above at the commencement of § 391, and Bulmerincq's articles on "Le droit des prises maritimes" in R.I., X–XIII. (1878–1881).

Grounds  
and  
Mode of  
Capture.

§ 429. From the statements given above in §§ 368–428 regarding blockade, contraband, analogous of contraband, and visitation, it is obvious that capture takes place either because the vessel or the cargo or both are liable to confiscation, or because grave suspicion demands a further inquiry, which can be carried out in a port only. Both cases are alike as far as all details of capture are concerned, and in the latter case Prize Courts may pronounce capture to be justified, although no ground for confiscation of either vessel or cargo or both has been detected.

The mode of capture is the same as described above in § 184 regarding capture of enemy vessels.<sup>1</sup>

Effect of  
Capture of  
Neutral  
Vessels,  
and their  
Conduct  
to Port.

§ 430. The effect of capture of neutral vessels is in every way different from the effect of capture of enemy vessels,<sup>2</sup> since the purpose of capture differs in these two cases. Capture of enemy vessels

<sup>1</sup> The "Règlement international des prises maritimes," adopted by the Institute of International Law at its meeting at Heidelberg in

1887, regulates capture in §§ 45–62; see *Annuaire*, IX. (1888), p. 204.

<sup>2</sup> See above, § 185.

is made for the purpose of appropriating them in the exercise of the right of belligerents to appropriate all enemy property found on the Open Sea or in the maritime territorial belt of either belligerent. On the other hand, neutral merchantmen are only captured for the purpose of confiscation of vessel or cargo, or both, as punishment for certain special acts, the punishment to be pronounced by a Prize Court after a thorough investigation into all the circumstances of the special case. Therefore, although the effect of capture of neutral vessels is that the vessels, the individuals, and the goods thereon are placed under the captor's authority, her officers and crew do not become prisoners of war. They are indeed to be detained as witnesses for the trial of the vessel and cargo, but nothing stands in the way of releasing those of them who are not wanted for that purpose. As regards passengers, if any, they have to be released as soon as possible, with the exception of those enemy persons who can be made prisoners of war.

Regarding the conduct of captured neutral vessels to a port of a Prize Court, the same is valid as regards conduct of captured enemy vessels<sup>1</sup> to such port.

§ 431. That as a rule captured neutral vessels may not be sunk, burned, or otherwise destroyed is as universally recognised as that captured enemy merchantmen may not as a rule be destroyed. But whereas, as shown above in § 194, the destruction of captured enemy merchantmen before a verdict is obtained against them is, in exceptional cases, lawful, it is a moot question whether the destruction of captured neutral vessels is likewise exceptionally

Destruction of Neutral Prizes.

<sup>1</sup> See above, § 193.

allowed instead of bringing them before a Prize Court.

British<sup>1</sup> practice does not, as regards the neutral owner of the vessel, hold the captor justified in destroying a vessel, however exceptional the case may be, and however meritorious the destruction of the vessel may be from the point of view of the Government of the captor. For this reason, should a captor, for any motive whatever, have destroyed a neutral prize, full indemnities are to be paid to the owner, although, if brought into a port of a Prize Court, condemnation of vessel and cargo would have been pronounced beyond doubt. The rule is, that a neutral prize must be abandoned in case it cannot, for any reason whatever, be brought to a port of a Prize Court.<sup>2</sup>

But the practice of other States does not recognise this rule. Thus, the United States Naval War Code, article 50, declares: "If there are controlling reasons why vessels that are properly captured may not be sent in for adjudication—such as unseaworthiness, the existence of infectious disease, or the lack of a prize-crew—they may be appraised and sold, and, if this cannot be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there should be no doubt that the vessel was a proper prize. But in all such cases all the papers and other testimony should be sent to the Prize Court, in order that a decree may be duly entered." According to Article 20 of her instructions of 1870,

<sup>1</sup> The *Actæon*, 2 Dodson, 48; *Felicity*, 2 Dodson, 381; *Leucade*, Spinks, 217. See Holland, *Prize Law*, § 303.

<sup>2</sup> See Professor Holland's letters published in the "Times" on August 6, 17, 30, 1904, and June 29, 1905. See also Holland,

*Neutral Duties in a Maritime War*, as illustrated by Recent Events (1905, from the Proceedings of the British Academy, vol. II.) pp. 12, 13; Phillimore, III. § 333; Twiss, II. § 166; Hall, § 77; Lawrence, § 215.

France allows her captors to destroy prizes—apparently neutral as well as enemy prizes—when the destruction is necessary for the safety of the captor or for the success of his operations. Russia, already in 1869, by § 108 of her Prize Regulations, allowed the destruction of a neutral as well as an enemy prize on account of its bad condition, risk of recapture, impossibility of sparing a prize crew, and small value of the prize vessel. And according to Article 21 of the Russian Prize Regulations of 1895 and Article 40 of instructions of 1901, the commander of a cruiser is authorised, under his personal responsibility, to burn or sink a neutral or enemy prize if it is impossible to preserve it on account of its bad condition, small value, danger of recapture, distance or blockade of the Russian ports, danger to the captor or the success of his operations. Japan, which according to Article 20 of her Prize Law of 1894 ordered her captors to release neutral prizes after confiscation of their contraband goods, in case the vessels cannot be brought into a port, altered her attitude in 1904, and allowed in certain cases the destruction of neutral prizes.

Continental writers on International Law agree just as little as the States on the question of destruction of neutral prizes. Whereas some emphatically answer it in the negative,<sup>1</sup> others decidedly answer it in the affirmative.<sup>2</sup>

Thus the matter is not at all settled. The question became of great importance in 1904, during the Russo-Japanese War. No case of Japanese captors sinking neutral prizes is reported but Russian

<sup>1</sup> See, for instance, Taylor, § 691, V. §§ 3019, 3028-3034; Fiore, and Kleen, II. pp. 531-534. III. No. 1655; Martens, II. § 126;

<sup>2</sup> See, for instance, Geffcken in Dupuis, Nos. 261-268; Perels, Holtzendorff, IV. p. 777; Calvo, § 55.

cruisers sank the following neutral vessels: the "Knight Commander," "Hipsang," "Ikhona," "St. Kilda" (British),<sup>1</sup> the "Tetardos" and "Thea" (German), the "Princess Marie" (Danish). It is not reported whether Germany and Denmark protested, but Great Britain strongly objected to the Russian practice and claimed damages for the British vessels concerned. There is no doubt that the matter will be a point to be discussed by the imminent second Peace Conference at the Hague. It ought to be settled in conformity with the more lenient British practice, for otherwise the door would be open to abuse.

It ought to be mentioned that the question of destruction of neutral prizes must not be confounded with the destruction of neutral vessels in exercise of the so-called right of angary. This right—see above, § 365—can be exercised against neutral vessels whether they are prizes or not.

Be that as it may, whenever a neutral vessel is for any reason whatever burnt, sunk, or otherwise destroyed, her crew, papers, and, if possible, her cargo, must be removed.

Ransom  
and Re-  
capture of  
Neutral  
Prizes.

§ 432. Regarding ransom of captured neutral vessels, the same is valid as regards ransom of captured enemy vessels.<sup>2</sup>

As regards recapture of neutral prizes,<sup>3</sup> the rule ought to be that *ipso facto* by recapture the vessel becomes free without payment of any salvage. Although captured, she was still the property of her neutral owners, and if condemnation had taken place at all, it would have been a punishment, and the re-

<sup>1</sup> See Lawrence, War, pp. 250-261.

<sup>2</sup> See above, § 195.

<sup>3</sup> See Hautefeuille, III. pp. 366-

406; Gessner, pp. 344-356; Kleen, II. § 217; Geffcken in Holtzendorff, IV. pp. 778-780; Calvo, V. §§ 3210-3216.

capturing belligerent has no interest whatever in the punishment of a neutral vessel by the enemy.

But the matter of recapture of neutral prizes is not settled, no rule of International Law and no uniform practice of the different States being formulated regarding it. Very few treaties touch upon it, and the municipal regulations of the different States regarding prizes seldom mention it. According to British practice,<sup>1</sup> the recaptor of a neutral prize is entitled to salvage, in case the recaptured vessel would have been liable to condemnation if brought into an enemy port.

§ 433. Besides the case in which captured vessels must be abandoned, because they can for some reason or another not be brought into a port, there are cases in which they are released without a trial. The rule is that a captured neutral vessel is to be tried by a Prize Court in case the captor asserts her to be suspicious or guilty. But it may happen that all suspicion is dispelled even before the trial, and then the vessel is to be released at once. For this reason Article 246 of Holland's Prize Law lays down the rule: "If, after the detention of the vessel, there should come to the knowledge of the commander any further acts tending to show that the vessel has been improperly detained, he should immediately release her. . . ." Even after she has been brought into the port of a Prize Court, release can take place without a trial. Thus the German vessels "Bundesrath" and "Herzog," which were captured in 1900 during the South African War and brought to Durban, were, after search had dispelled all suspicion, released without trial.

Release  
after  
Capture.

<sup>1</sup> The War Onskan, 2 Rob. 299. See Holland, Prize Law, § 270.



## III

## TRIAL OF CAPTURED NEUTRAL VESSELS

Lawrence, §§ 212-214—Maine, p. 96—Manning, pp. 472-483—Phillimore, III. §§ 433-508—Twiss, II. §§ 169-170—Halleck, II. pp. 393-429—Taylor, §§ 563-567—Wharton, III. §§ 328-330—Wheaton, §§ 389-397—Bluntschli, §§ 841-862—Heffter, §§ 172-173—Geffcken in Holtzendorff, IV. pp. 781-788—Ullmann, § 168—Bonfils, Nos. 1676-1691—Despagnet, Nos. 664-670—Rivier, II. pp. 353-356—Calvo, V. §§ 3035-3087—Fiore, III. Nos. 1681-1691—Martens, II. §§ 125-126—Kleen, II. §§ 219-234—Gessner, pp. 357-427—Boeck, Nos. 740-800—Dupuis, Nos. 282-301—Perels, §§ 56-57—Testa, pp. 244-247—Hautefeuille, III. pp. 299-365.—See also the monographs quoted above at the commencement of § 391, and Bulmerincq's articles on "Les droits des prises maritimes" in R.I., X.-XIII. (1878-1881).

Trial of  
Captured  
Vessels a  
Municipal  
Matter.

§ 434. Although belligerents have, according to International Law, the right to capture neutral vessels under certain circumstances, and although they have the duty to bring these vessels for trial before Prize Courts, such trials are in no way an international matter. Just as Prize Courts are a municipal<sup>1</sup> institution, so trials of captured neutral vessels are a municipal matter. The neutral home States of the vessels are not represented and, directly at least, not concerned in the trial. Nor is, as commonly maintained, the law administered by Prize Courts International Law. These Courts apply the law of their country. The best proof of this is the fact that the practice of the Prize Courts of different countries differs in many points. Thus, for

<sup>1</sup> See above, § 192. The matter is regulated as far as Great Britain is concerned by the Naval Prize Act, 1864 (27 and 28 Vict. ch. 25) and the Prize Courts Act, 1894 (57 and 58 Vict. ch. 39); see Appendices XI. and XII. below, pp. 540 and 555. The "Règlement in-

ternational des prises maritimes," adopted in 1887 at Heidelberg by the Institute of International Law, provides in §§ 63-118 detailed rules concerning the organisation of Prize Courts and the procedure before them; see *Annuaire*, IX. (1888), p. 208.

instance, the question what is and what is not contraband, and, further, the question when an attempt to break blockade begins and when it ends, are differently answered by the practice of different States. A State may, of course, order its Prize Courts to apply regarding certain cases and questions the rules of International Law. But thereby the respective State, instead of supplying the Courts with Municipal Law, leaves it to them to build up a practice which is in accordance with International Law. And there ought to be no doubt that a State in fact can at any moment interfere and order its Prize Courts to apply henceforth such and such rules, whether or not the latter are in accordance with International Law.<sup>1</sup> That a State by ordering its Prize Courts to apply rules which are not in accordance with International Law would commit an international delinquency is, of course, obvious.

§ 435. The results of the trial of captured neutral ships can be five. Vessel and cargo may be condemned, or the vessel alone, or the cargo alone; and the vessel and cargo may be released either with or without costs and damages. Costs and damages will be allowed when capture was not justified. But

Result  
of Trial.

<sup>1</sup> Many writers on International Law maintain that Prize Courts are International Courts, and that the law administered by these courts is International Law. Lord Stowell again and again—the *Maria*, 1 Rob. 340; *Recovery*, 6 Rob. 348; Fox and Others, Edwards, 311—emphatically asserted it. And almost all English and American writers—see, however, Holland, *Studies*, p. 199, who agrees with me—adopt Lord Stowell's standpoint; see Halleck, II. pp. 411-412; Maine, p. 96; Manning, p. 472; Philli-

more, III. §§ 433-436; Hall, § 277; Lawrence, § 212. But it is to be expected that the recognition of the differences between Municipal and International Law—see above, vol. I. §§ 20-25—and of the fact that States only, and neither their officials nor their Courts nor their citizens are subjects of International Law—see above, vol. I. § 13—will lead to the general recognition of the fact that the law applied by Prize Courts is not and cannot be International Law.

it must be emphasised that capture may be justified, as, for instance, in the case of spoliation of papers, although the Prize Court does not condemn the vessel, and, further, that costs and damages are never allowed in case a part only of the cargo is condemned, although the vessel herself and the greater part of the cargo are released. That, in case the captor is unable to pay the costs and damages allowed to a released neutral vessel, his Government has to indemnify the vessel, there ought to be no doubt, for a State bears "vicarious" responsibility<sup>1</sup> for internationally injurious acts of his naval forces.

Trial after  
Conclu-  
sion of  
Peace.

§ 436. It is a moot question whether neutral vessels captured before conclusion of peace can be tried after the conclusion of peace.<sup>2</sup> I think that the answer must be in the affirmative, even if a special clause is contained in the Treaty of Peace, which stipulates that captured but not yet condemned vessels of the belligerents shall be released. A trial of neutral prizes is in any case necessary for the purpose of deciding the fact whether or not capture was justified, and whether, although condemnation would not be justified, the neutral vessels can claim costs and indemnities. Thus, after the conclusion of the Abyssinian War, in December 1896, the Italian Prize Commission, in the case of the "Doelwijk,"<sup>3</sup> pronounced its right to try the vessel in spite of the fact

<sup>1</sup> See above, vol. I. § 163.

<sup>2</sup> See Perels, § 57, p. 309, in contradistinction to Bluntschli, § 862. But there is, of course, no doubt that the belligerent concerned can exercise an act of grace and release such prizes. Thus, in November 1905, at the end of the Russo-Japanese War, the Mikado proclaimed the unconditional release of all neutral

prizes captured after the signing but before the ratification of the Peace of Portsmouth. Thereby, three German vessels, two English, and one Norwegian escaped confiscation, which in strict law—see above, p. 458, note 4—would have been justified.

<sup>3</sup> See Martens, N.R.G., 2nd ser. XXVIII. pp. 66-90.

that peace had been concluded between the time of capture and trial, declared the capture of the vessel and cargo to have been justified, but pronounced that, peace having been concluded, confiscation of vessel and cargo would no longer be lawful.

Different from the question whether neutral prizes can be tried after the conclusion of peace is the other question whether they can be condemned to be confiscated. In the above-mentioned case of the "Doelwijk" the question was answered in the negative, but I believe it ought to be answered in the affirmative. Confiscation of vessel and cargo having the character of a punishment, it would seem that the punishment may be inflicted after the conclusion of peace provided the criminal act concerned was consummated before peace was concluded. But nothing, of course, stands in the way of the single States taking a more lenient view and ordering their Prize Courts not to pronounce confiscation of neutral vessels after the conclusion of peace.

§ 437. If a trial leads to condemnation, and if the latter is confirmed by the Court of Appeal, the matter as between the captor and the owner of the captured vessel and cargo is finally settled. But the right of protection,<sup>1</sup> which a State exercises over its subjects and their property abroad, may nevertheless be the cause of diplomatic protests and claims on the part of the neutral home State of a condemned vessel or cargo, in case the verdict of the Prize Courts is considered not in accordance with International Law or formally or materially unjust. It is through such protests and claims that the matter, which was hitherto a mere municipal one, becomes of *international* importance. And history records many

Protests  
and  
Claims of  
Neutrals  
after  
Trial.

<sup>1</sup> See above, vol. I. § 319.

instances of cases of interposition of neutral States after trials of vessels which had sailed under their flag. Thus, for instance, in the famous case of the Silesian Loan,<sup>1</sup> it was the fact that Frederick II. of Prussia considered the procedure of British Prize Courts regarding a number of Prussian merchantmen captured during war between Great Britain and France in 1747 and 1748 as unjust, which made him in 1752 resort to reprisals and cease the payment of the interest of the Silesian Loan. The matter was settled<sup>2</sup> in 1756, through the payment of 20,000*l.* as indemnity by Great Britain. Thus, further, after the American Civil War, Articles 12-17 of the Treaty of Washington<sup>3</sup> provided the appointment of three Commissioners for the purpose, amongst others, of deciding all claims against verdicts of the American Prize Courts. And when in 1879, during war between Peru and Chile, the German vessel "Luxor" was condemned by the Peruvian Courts, Germany interposed and the vessel was released.<sup>4</sup>

Reform  
Projects.

§ 438. Numerous inconveniences result from the present condition of International Law, according to which the Courts of the belligerent whose forces have captured neutral vessels exercise jurisdiction without any control on the part of neutrals. Although, as shown above in § 437, neutrals interfere sometimes after the trial and succeed in getting their claims recognised in the face of the verdicts of Prize Courts, the present condition of matters is not satisfactory, and has, therefore, called forth several proposals for so-called mixed Prize Courts.<sup>5</sup> The

<sup>1</sup> See above, § 37.

<sup>2</sup> See Martens, *Causes Célèbres*, II. p. 167.

<sup>3</sup> See Martens, *N.R.G.*, XX. p. 698.

<sup>4</sup> See above, § 404.

<sup>5</sup> See Boeck, Nos. 748-764; Geffcken in Holtzendorff, IV. p. 787; Dupuis, No. 289; Bulmerincq in *R.I.*, XI. (1879), pp. 173-191.

first proposal of this kind was made in 1759 by Hübner,<sup>1</sup> who suggested a Prize Court composed of judges nominated by the belligerent and of consuls or councillors nominated by the home State of the captured neutral merchantmen. A somewhat similar proposal was made by Tetens<sup>2</sup> in 1805. Other proposals followed until the Institute of International Law took up the matter in 1875, appointing, on the proposal of Professor Westlake, at its meeting at the Hague, a Commission for the purpose of drafting a "Projet d'organisation d'un tribunal international des prises maritimes." In the course of time there were in the main two proposals before the Institute, Westlake's and Bulmerincq's. Westlake proposed<sup>3</sup> a Court of Appeal to be instituted in each case of war, which should consist of three judges—one to be nominated by the belligerent concerned, another by the home State of the neutral prizes concerned, and the third by a neutral Power not interested in the case. According to Westlake's proposal there would therefore have to be instituted in every war as many Courts of Appeal as neutrals are concerned. Bulmerincq proposed<sup>4</sup> two Courts to be instituted in each war for all prize cases—the one to act as Prize Court of the First Instance, the other to act as Prize Court of Appeal, each Court to consist of three judges—one judge to be appointed by either belligerent, the third judge to be appointed in common by all neutral maritime Powers. Finally, the Institute agreed at its meeting at Heidelberg in 1887 upon the following proposal,

<sup>1</sup> De la saisie des bâtiments neutres (1759), vol. II. p. 21.

<sup>2</sup> Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer, avec les principes du droit

de guerre en général (1805), p. 62.

<sup>3</sup> See Annuaire, II. (1878), p. 114.

<sup>4</sup> See R.I., XI. (1879), pp. 191-194.

which is embodied in §§ 100-109 of the "Règlement international des prises maritimes :"<sup>1</sup> At the beginning of a war either belligerent institutes a Court of Appeal consisting of five judges, the president and one of the other judges to be appointed by the belligerent, the three remaining to be nominated by three neutral Powers, this Court to be competent for all prize cases.

Thus the matter stands at present. To carry out the proposal of the Institute, it would first be necessary for the Powers to agree upon a common code of prize law, such as proposed by the "Règlement international des prises maritimes" of the Institute.

<sup>1</sup> *Annuaire*, IX. (1887), p. 239.

# APPENDICES





## APPENDIX I

### FOREIGN ENLISTMENT ACT, 1870

33 & 34 VICT., CHAPTER 90

An Act to regulate the conduct of Her Majesty's Subjects during the existence of hostilities between foreign states with which Her Majesty is at peace. [9 August 1870.]

WHEREAS it is expedient to make provision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

#### *Preliminary*

1. This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870."

2. This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

3. This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act.

Short  
Title of  
Act.  
Applica-  
tion  
of Act.  
Commence-  
ment of  
Act.

*Illegal Enlistment*

Penalty  
on Enlist-  
ment in  
Service of  
Foreign  
State.

4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty  
on leaving  
Her  
Majesty's  
Domi-  
nions with  
intent to  
serve a  
Foreign  
State.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty  
on em-  
barking  
Persons  
under  
False  
Represent-  
ations  
as to  
Service.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons ; that is to say,

Penalty on taking illegally enlisted Persons on board Ship.

- (1.) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state :
- (2.) Any person, being a British subject, who, without the license of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state :
- (3.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state :

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue ; that is to say,

- (1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour : and
- (2.) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace : and
- (3.) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

*Illegal Shipbuilding and Illegal Expeditions*

Penalty  
on illegal  
Ship-  
building  
and illegal  
Expedi-  
tions.

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say,—

- (1.) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state : or
- (2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state : or
- (3.) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state : or
- (4.) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state :

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue :

- (1.) The offender shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.
- (2.) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty :

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following ; (that is to say.)

- (1.) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or

equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State :

- (2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

9. Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.

Presump-  
tion as to  
Evidence  
in case of  
Illegal  
Ship.

10. If any person within the dominions of Her Majesty, and without the license of Her Majesty,—

Penalty  
on aiding  
the  
Warlike  
Equip-  
ment of  
Foreign  
Ships.

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,—

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.

11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Penalty  
on fitting  
out Naval  
or Military  
Expedi-  
tions  
without  
License.

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue :

- (1.) Every person engaged in such preparation or fitting out,

or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2.) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

Punish-  
ment of  
Access-  
ories.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

Limita-  
tion of  
Term of  
Imprison-  
ment.

13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

#### *Illegal Prize*

Illegal  
Prize  
brought  
into  
British  
Ports  
restored.

14. If during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandize captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent or for any person authorised in that behalf by the Government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal as in case of any order made in the exercise of the ordinary jurisdiction of such court; and in the meantime and until a final order has been made on such application the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandize, and (if the same be of perishable nature, or incurring risk of

deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction.

### *General Provision*

15. For the purposes of this Act, a license by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

License  
by Her  
Majesty  
how  
granted.

### *Legal Procedure*

16. Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

Jurisdiction  
in  
respect of  
Offences  
by Persons  
against  
Act.

17. Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

Venue in  
respect of  
Offences  
by  
Persons.  
24 & 25  
Vict. c. 97.

18. The following authorities, that is to say, in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Power to  
remove  
Offenders  
for Trial.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed



shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

Jurisdiction in respect of Forfeiture of Ships for Offences against Act.

19. All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court; and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Regulations as to Proceedings against the Offender and the Ship.

20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Officer authorised to seize offending Ships.

21. The following officers, that is to say,

- (1.) Any officer of customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade;
- (2.) Any officer of customs or public officer in any British possession, subject nevertheless to any special or general instructions from the governor of such possession;
- (3.) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer;

- (4.) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer,

may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority;" but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

22. Any officer authorised to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officers or officers of customs, or any harbour-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same, and to enforce the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, Her heirs and successors, as against all persons so killed, maimed, or hurt.

Powers of  
Officers  
authorised  
to seize  
Ships.

23. If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner herein-after mentioned.

Special  
Power of  
Secretary  
of State  
or Chief  
Executive  
Authority  
to detain  
Ship.

The owner of the ship so detained, or his agent, may apply

to the Court of Admiralty for its release, and the court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped or intended to be despatched contrary to this Act, the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

The court may in cases where no proceedings are pending for its condemnation release any ship detained under this section on the owner giving security to the satisfaction of the court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the Commissioners of the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the court, in a summary way, in cases where the ship is released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the court for such release.

Nothing in this section contained shall affect any proceedings instituted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to for-

feiture, subject to this provision, that if such ship is restored in pursuance of this section all proceedings for such condemnation shall be stayed ; and where the court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges, and expenses incurred by such owner in or about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country.

24. Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Special  
Power of  
Local  
Authority  
to detain  
Ship.

Upon the receipt of such communication the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped or intended to be despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having

issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the court for such release.

Power of  
Secretary  
of State or  
Executive  
Authority  
to grant  
Search  
Warrant.

25. The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign state at war with a friendly state, and to search such ship.

Exercise  
of Powers  
of Secre-  
tary of  
State or  
Chief  
Executive  
Authority.

26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say,

- (1.) In Ireland by the Lord Lieutenant or other the chief governor or governors of Ireland for the time being, or the chief secretary to the Lord Lieutenant :
- (2.) In Jersey by the Lieutenant Governor :
- (3.) In Guernsey, Alderney, and Sark, and the dependent islands by the Lieutenant Governor :
- (4.) In the Isle of Man by the Lieutenant Governor :
- (5.) In any British possession by the Governor :

A copy of any warrant issued by a Secretary of State or by any officer authorised in pursuance of this Act to issue such warrant in Ireland, the Channel Islands, or the Isle of Man shall be laid before Parliament.

Appeal  
from  
Court of  
Admi-  
ralty.

27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the court as a Court of Admiralty.

Indemnity  
to Officers.

28. Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

Indemnity  
to Secre-  
tary of  
State or  
Chief  
Executive  
Authority.

29. The Secretary of State shall not, nor shall the chief executive authority, be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness,

except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.

*Interpretation Clause*

30. In this Act, if not inconsistent with the context, the following terms have the meanings herein-after respectively assigned to them ; that is to say,

Interpre-  
tation of  
Terms.

"Foreign state" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people :

"Foreign  
State : "

"Military service" shall include military telegraphy and any other employment whatever, in or in connexion with any military operation :

"Military  
Service : "

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque ; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque :

"Naval  
Service : "

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands :

"United  
King-  
dom : "

"British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom, as defined by this Act :

"British  
Posses-  
sions : "

"The Secretary of State" shall mean any one of Her Majesty's Principal Secretaries of State :

"The  
Secretary  
of State : "

"The Governor" shall as respects India mean the Governor General or the Governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession or the Governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession ; also any person acting for or in the capacity of a governor shall be included under the term "Governor" :

"Gover-  
nor : "

" Court of Admiralty : "	" Court of Admiralty " shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty's dominions :
" Ship : "	" Ship " shall include any description of boat, vessel, floating battery, or floating craft ; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water :
" Building : "	" Building " in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly :
" Equip- ping : "	" Equipping " in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly :
" Ship and Equip- ment : "	" Ship and equipment " shall include a ship and everything in or belonging to a ship :
" Mas- ter : "	" Master " shall include any person having the charge or command of a ship.

*Repeal of Acts, and Saving Clauses*

Repeal of  
Foreign  
Enlist-  
ment Act.  
59 G. 3.  
c. 69.

31. From and after the commencement of this Act, an Act passed in the fifty-ninth year of the reign of His late Majesty King George the Third, chapter sixty-nine, intituled " An Act " to prevent the enlisting or engagement of His Majesty's " subjects to serve in foreign service, and the fitting out or " equipping, in His Majesty's dominions, vessels for warlike " purposes, without His Majesty's license," shall be repealed: Provided that such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, nor the institution of any investigation or legal proceeding, or any other remedy for enforcing any such penalty, forfeiture, or punishment as aforesaid.

Saving as  
to Com-  
missioned  
Foreign  
Ships.

32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to

recognition as a commissioned ship of any foreign state any jurisdiction which it would not have had if this Act had not passed.

33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, states, or potentates in Asia.

Penalties  
not to  
extend to  
Persons  
entering  
into  
Military  
Service  
in Asia.  
59 G. 3.  
c. 69, s. 12.



## APPENDIX II

### DECLARATION OF PARIS (1856)

LES Plénipotentiaires qui ont signé le Traité de Paris du trente Mars, mil huit cent cinquante-six, réunis en Conférence,—

Considérant :

Que le droit maritime, en temps de guerre, a été pendant longtemps l'objet de contestations regrettables ;

Que l'incertitude du droit et des devoirs en pareille matière, donne lieu, entre les neutres et les belligérants, à des divergences d'opinion qui peuvent faire naître des difficultés sérieuses et même des conflits ;

Qu'il y a avantage, par conséquent, à établir une doctrine uniforme sur un point aussi important ;

Que les Plénipotentiaires assemblés au Congrès de Paris ne sauraient mieux répondre aux intentions, dont leurs Gouvernements sont animés, qu'en cherchant à introduire dans les rapports internationaux des principes fixes à cet égard ;

Dûment autorisés, les susdits Plénipotentiaires sont convenus de se concerter sur les moyens d'atteindre ce but ; et étant tombés d'accord ont arrêté la Déclaration solennelle ci-après :—

1. La course est et demeure abolie ;
2. Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre ;
3. La marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi ;
4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.

Les Gouvernements des Plénipotentiaires soussignés s'engagent à porter cette Déclaration à la connaissance des Etats, qui n'ont pas été appelés à participer au Congrès de Paris, et à les inviter à y accéder.

Convaincus que les maximes qu'ils viennent de proclamer ne sauraient être accueillies qu'avec gratitude par le monde entier, les Plénipotentiaires soussignés ne doutent pas, que les efforts de leurs Gouvernements pour en généraliser l'adoption ne soient couronnés d'un plein succès.

La présente Déclaration n'est et ne sera obligatoire qu'entre les Puissances, qui y ont, ou qui y auront accédé.

Fait à Paris, le seize Avril, mil huit cent cinquante-six.

## APPENDIX III

### GENEVA CONVENTION (1864)

#### ARTICLE I

LES ambulances et les hôpitaux militaires seront reconnus neutres, et, comme tels, protégés et respectés par les belligérants aussi longtemps, qu'il s'y trouvera des malades ou des blessés.

La neutralité cesserait, si ces ambulances ou ces hôpitaux étaient gardés par une force militaire.

#### ARTICLE II

Le personnel des hôpitaux et des ambulances, comprenant l'intendance, les services de santé, d'administration, de transport des blessés, ainsi que les aumôniers, participera au bénéfice de la neutralité lorsqu'il fonctionnera, et tant qu'il restera des blessés à relever ou à secourir.

#### ARTICLE III

Les personnes désignées dans l'Article précédent pourront, même après l'occupation par l'ennemi, continuer à remplir leurs fonctions dans l'hôpital ou l'ambulance qu'elles desservent, ou se retirer pour rejoindre le corps auquel elles appartiennent.

Dans ces circonstances, lorsque ces personnes cesseront leurs fonctions, elles seront remises aux avant-postes ennemis, par les soins de l'armée occupante.

#### ARTICLE IV

Le matériel des hôpitaux militaires demeurant soumis aux lois de la guerre, les personnes attachées à ces hôpitaux ne pourront, en se retirant, emporter que les objets, qui sont leur propriété particulière.

Dans les mêmes circonstances, au contraire, l'ambulance conservera son matériel.

## ARTICLE V

Les habitants du pays qui porteront secours aux blessés seront respectés, et demeureront libres. Les Généraux des Puissances belligérantes auront pour mission de prévenir les habitants de l'appel fait à leur humanité, et de la neutralité qui en sera la conséquence.

Tout blessé recueilli et soigné dans une maison y servira de sauvegarde. L'habitant qui aura recueilli chez lui des blessés sera dispensé du logement des troupes, ainsi que d'une partie des contributions de guerre qui seraient imposées.

## ARTICLE VI

Les militaires blessés ou malades seront recueillis et soignés, à quelque nation qu'ils appartiendront.

Les Commandants en chef auront la faculté de remettre immédiatement aux avantpostes ennemis, les militaires blessés pendant le combat, lorsque les circonstances le permettront, et du consentement des deux partis.

Seront renvoyés dans leurs pays ceux qui, après guérison, seront reconnus incapables de servir.

Les autres pourront être également renvoyés, à la condition de ne pas reprendre les armes pendant la durée de la guerre.

Les évacuations, avec le personnel qui les dirige, seront couvertes par une neutralité absolue.

## ARTICLE VII

Un drapeau distinctif et uniforme sera adopté pour les hôpitaux, les ambulances, et les évacuations. Il devra être, en toute circonstance, accompagné du drapeau national.

Un brassard sera également admis pour le personnel neutralisé, mais la délivrance en sera laissée à l'autorité militaire.

Le drapeau et le brassard porteront croix rouge sur fond blanc.

## ARTICLE VIII

Les détails d'exécution de la présente Convention seront réglés par les Commandants en chef des armées belligérantes, d'après les instructions de leurs Gouvernements respectifs, et conformément aux principes généraux énoncés dans cette Convention.

## ARTICLE IX

Les Hautes Puissances Contractantes sont convenues de communiquer la présente Convention aux Gouvernements, qui n'ont pu envoyer des Plénipotentiaires à la Conférence internationale de Genève, en les invitant à y accéder; le Protocole est à cet effet laissé ouvert.

## ARTICLE X

La présente Convention sera ratifiée, et les ratifications en seront échangées à Berne, dans l'espace de quatre mois, ou plus tôt si faire se peut.

En foi de quoi les Plénipotentiaires respectifs l'ont signée, et y ont apposé le cachet de leurs armes.

Fait à Genève, le vingt-deuxième jour du mois d'Août, de l'an mil huit cent soixante-quatre.

## APPENDIX IV

### DECLARATION OF ST. PETERSBURG (1868)

SUR la proposition du Cabinet Impérial de Russie, une Commission Militaire Internationale ayant été réunie à Saint-Petersbourg, afin d'examiner la convenance d'interdire l'usage de certains projectiles en temps de guerre entre les nations civilisées, et cette Commission ayant fixé d'un commun accord les limites techniques où les nécessités de la guerre doivent s'arrêter devant les exigences de l'humanité, les Soussignés sont autorisés par les ordres de leurs Gouvernements à déclarer ce qui suit :

Considérant que les progrès de la civilisation doivent avoir pour effet d'atténuer autant que possible les calamités de la guerre ;

Que le seul but légitime que les Etats doivent se proposer durant la guerre est l'affaiblissement des forces militaires de l'ennemi ;

Qu'à cet effet, il suffit de mettre hors de combat le plus grand nombre d'hommes possible ;

Que ce but serait dépassé par l'emploi d'armes qui aggraveraient inutilement les souffrances des hommes mis hors de combat, ou rendraient leur mort inévitable ;

Que l'emploi de pareilles armes serait dès lors contraire aux lois de l'humanité ;

Les Parties Contractantes s'engagent à renoncer mutuellement, en cas de guerre entre elles, à l'emploi par leurs troupes de terre ou de mer, de tout projectile d'un poids inférieur à 400 grammes, qui serait ou explosible ou chargé de matières fulminantes ou inflammables.

Elles inviteront tous les Etats, qui n'ont pas participé par l'envoi de Délégués aux délibérations de la Commission Militaire Internationale réunie à Saint-Petersbourg, à accéder au présent engagement.

Cet engagement n'est obligatoire que pour les Parties Contractantes ou Accédantes en cas de guerre entre deux ou plusieurs d'entre elles : il n'est pas applicable vis-à-vis de Parties non-Contractantes ou qui n'auraient pas accédé.

Il cesserait également d'être obligatoire du moment où, dans une guerre entre Parties Contractantes ou Accédantes, une partie non-Contractante, ou qui n'aurait pas accédé, se joindrait à l'un des belligérants.

Les Parties Contractantes ou Accédantes se réservent de s'entendre ultérieurement toutes les fois qu'une proposition précise serait formulée en vue des perfectionnements à venir que la science pourrait apporter dans l'armement des troupes, afin de maintenir les principes, qu'elles ont posés et de concilier les nécessités de la guerre avec les lois de l'humanité.

Fait à Saint-Pétersbourg, le <sup>vingt-neuf Novembre</sup>  
<sub>onze Décembre</sub>, mil huit cent soixante-huit.

## APPENDIX V

### INTERNATIONAL CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

*Signed at the Hague, July 29, 1899*

#### TITRE I.—*Du Maintien de la Paix générale*

##### ARTICLE I

En vue de prévenir autant que possible le recours à la force dans les rapports entre les États, les Puissances Signataires conviennent d'employer tous leurs efforts pour assurer le règlement pacifique des différends internationaux.

#### TITRE II.—*Des Bons Offices et de la Médiation*

##### ARTICLE II

En cas de dissentiment grave ou de conflit, avant d'en appeler aux armes, les Puissances Signataires conviennent d'avoir recours, en tant que les circonstances le permettront, aux bons offices ou à la médiation d'une ou de plusieurs Puissances amies.

##### ARTICLE III

Indépendamment de ce recours, les Puissances Signataires jugent utile qu'une ou plusieurs Puissances étrangères au conflit offrent de leur propre initiative, en tant que les circonstances s'y prêtent, leurs bons offices ou leur médiation aux États en conflit.

Le droit d'offrir les bons offices ou la médiation appartient aux Puissances étrangères au conflit, même pendant le cours des hostilités.

L'exercice de ce droit ne peut jamais être considéré par l'une ou l'autre des Parties en litige comme un acte peu amical.



## ARTICLE IV

Le rôle du médiateur consiste à concilier les prétensions opposées et à apaiser les ressentiments qui peuvent s'être produits entre les Etats en conflit.

## ARTICLE V

Les fonctions du médiateur cessent du moment où il est constaté, soit par l'une des Parties en litige, soit par le médiateur lui-même, que les moyens de conciliation proposés par lui ne sont pas acceptés.

## ARTICLE VI

Les bons offices et la médiation, soit sur le recours des Parties en conflit, soit sur l'initiative des Puissances étrangères au conflit, ont exclusivement le caractère de Conseil et n'ont jamais force obligatoire.

## ARTICLE VII

L'acceptation de la médiation ne peut avoir pour effet, sauf Convention contraire, d'interrompre, de retarder, ou d'entraver la mobilisation et autres mesures préparatoires à la guerre.

Si elle intervient après l'ouverture des hostilités, elle n'interrompt pas, sauf Convention contraire, les opérations militaires en cours.

## ARTICLE VIII

Les Puissances Signataires sont d'accord pour recommander l'application, dans les circonstances qui le permettent, d'une médiation spéciale sous la forme suivante :—

En cas de différend grave compromettant la paix, les Etats en conflit choisissent respectivement une Puissance à laquelle ils confient la mission d'entrer en rapport direct avec la Puissance choisie d'autre part, à l'effet de prévenir la rupture des relations pacifiques.

Pendant la durée de ce mandat dont le terme, sauf stipulation contraire, ne peut excéder trente jours, les Etats en litige cessent tout rapport direct au sujet du conflit, lequel est considéré comme déferé exclusivement aux Puissances Médiatrices. Celles-ci doivent appliquer tous leurs efforts à régler le différend.

En cas de rupture effective des relations pacifiques, ces Puissances demeurent chargées de la mission commune de profiter de toute occasion pour rétablir la paix.

### TITRE III.—*Des Commissions Internationales d'Enquête*

#### ARTICLE IX

Dans les litiges d'ordre international n'engageant ni l'honneur ni des intérêts essentiels et provenant d'une divergence d'appréciation sur des points de fait, les Puissances Signataires jugent utile que les Parties qui n'auraient pu se mettre d'accord par les voies diplomatiques instituent, en tant que les circonstances le permettront, une Commission Internationale d'Enquête chargée de faciliter la solution de ces litiges en éclaircissant, par un examen impartial et consciencieux, les questions de fait.

#### ARTICLE X

Les Commissions Internationales d'Enquête sont constituées par Convention spéciale entre les Parties en litige.

La Convention d'Enquête précise les faits à examiner et l'étendue des pouvoirs des Commissaires.

Elle règle la procédure.

L'enquête a lieu contradictoirement.

La forme et les délais à observer, en tant qu'ils ne sont pas fixés par la Convention d'Enquête, sont déterminés par la Commission elle-même.

#### ARTICLE XI

Les Commissions Internationales d'Enquête sont formées, sauf stipulation contraire, de la manière déterminée par l'Article XXXII de la présente Convention.

#### ARTICLE XII

Les Puissances en litige s'engagent à fournir à la Commission Internationale d'Enquête, dans la plus large mesure qu'Elles jugeront possible, tous les moyens et toutes les facilités nécessaires pour la connaissance complète et l'appréciation exacte des faits en question.

## ARTICLE XIII

La Commission Internationale d'Enquête présente aux Puissances en litige son Rapport signé par tous les membres de la Commission.

## ARTICLE XIV

Le Rapport de la Commission Internationale d'Enquête, limité à la constatation des faits, n'a nullement le caractère d'une sentence arbitrale. Il laisse aux Puissances en litige une entière liberté pour la suite à donner à cette constatation.

TITRE IV.—*De l'Arbitrage International*Chapitre I.—*De la Justice Arbitrale*

## ARTICLE XV

L'arbitrage international a pour objet le règlement de litiges entre les États par des Juges de leur choix et sur la base du respect du droit.

## ARTICLE XVI

Dans les questions d'ordre juridique, et en premier lieu dans les questions d'interprétation ou d'application des Conventions Internationales, l'arbitrage est reconnu par les Puissances Signataires comme le moyen le plus efficace et en même temps le plus équitable de régler les litiges qui n'ont pas été résolus par les voies diplomatiques.

## ARTICLE XVII

La Convention d'Arbitrage est conclue pour des contestations déjà nées ou pour des contestations éventuelles.

Elle peut concerner tout litige ou seulement les litiges d'une catégorie déterminée.

## ARTICLE XVIII

La Convention d'Arbitrage implique l'engagement de se soumettre de bonne foi à la sentence arbitrale.

## ARTICLE XIX

Indépendamment des Traités généraux ou particuliers qui stipulent actuellement l'obligation du recours à l'arbitrage pour

les Puissances Signataires, ces Puissances se réservent de conclure, soit avant la ratification du présent Acte, soit postérieurement, des accords nouveaux, généraux, ou particuliers, en vue d'étendre l'arbitrage obligatoire à tous les cas qu'elles jugeront possible de lui soumettre.

## Chapitre II.—*De la Cour Permanente d'Arbitrage*

### ARTICLE XX

Dans le but de faciliter le recours immédiat à l'arbitrage pour les différends internationaux qui n'ont pu être réglés par la voie diplomatique, les Puissances Signataires s'engagent à organiser une Cour Permanente d'Arbitrage, accessible en tout temps et fonctionnant, sauf stipulation contraire des Parties, conformément aux règles de procédure insérées dans la présente Convention.

### ARTICLE XXI

La Cour Permanente sera compétente pour tous les cas d'arbitrage, à moins qu'il n'y ait entente entre les Parties pour l'établissement d'une juridiction spéciale.

### ARTICLE XXII

Un Bureau International établi à La Haye sert de greffe à la Cour.

Ce Bureau est l'intermédiaire des communications relatives aux réunions de celle-ci.

Il a la garde des archives et la gestion de toutes les affaires administratives.

Les Puissances Signataires s'engagent à communiquer au Bureau International de La Haye une copie certifiée conforme de toute stipulation d'arbitrage intervenue entre elles et de toute sentence arbitrale les concernant et rendue par des juridictions spéciales.

Elles s'engagent à communiquer de même au Bureau, les lois, règlements, et documents constatant éventuellement l'exécution des sentences rendues par la Cour.

### ARTICLE XXIII

Chaque Puissance Signataire désignera, dans les trois mois qui suivront la ratification par elle du présent Acte, quatre

personnes au plus, d'une compétence reconnue dans les questions de droit international, jouissant de la plus haute considération morale et disposées à accepter les fonctions d'arbitres.

Les personnes ainsi désignées seront inscrites, au titre de membres de la Cour, sur une liste qui sera notifiée à toutes les Puissances Signataires par les soins du Bureau.

Toute modification à la liste des arbitres est portée, par les soins du Bureau, à la connaissance des Puissances Signataires.

Deux ou plusieurs Puissances peuvent s'entendre pour la désignation en commun d'un ou de plusieurs membres.

La même personne peut être désignée par des Puissances différentes.

Les membres de la Cour sont nommés pour un terme de six ans. Leur mandat peut être renouvelé.

En cas de décès ou de retraite d'un membre de la Cour, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

#### ARTICLE XXIV

Lorsque les Puissances Signataires veulent s'adresser à la Cour Permanente pour le règlement d'un différend survenu entre elles, le choix des arbitres appelés à former le Tribunal compétent pour statuer sur ce différend, doit être fait dans la liste générale des membres de la Cour.

A défaut de constitution du Tribunal Arbitral par l'accord immédiat des Parties, il est procédé de la manière suivante :

Chaque Partie nomme deux arbitres et ceux-ci choisissent ensemble un surarbitre.

En cas de partage de voix, le choix du surarbitre est confié à une Puissance tierce, désignée de commun accord par les Parties.

Si l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente, et le choix du surarbitre est fait de concert par les Puissances ainsi désignées.

Le Tribunal étant ainsi composé, les Parties notifient au Bureau leur décision de s'adresser à la Cour et les noms des arbitres.

Le Tribunal Arbitral se réunit à la date fixée par les Parties.

Les membres de la Cour, dans l'exercice de leurs fonctions et en dehors de leur pays, jouissent des privilèges et immunités diplomatiques.

## ARTICLE XXV

Le Tribunal Arbitral siège d'ordinaire à La Haye.

Le siège ne peut, sauf le cas de force majeure, être changé par le Tribunal que de l'assentiment des Parties.

## ARTICLE XXVI

Le Bureau International de La Haye est autorisé à mettre ses locaux et son organisation à la disposition des Puissances Signataires pour le fonctionnement de toute juridiction spéciale d'arbitrage.

La juridiction de la Cour Permanente peut être étendue, dans les conditions prescrites par les règlements, aux litiges existant entre des Puissances non-Signataires ou entre des Puissances Signataires et des Puissances non-Signataires, si les Parties sont convenues de recourir à cette juridiction.

## ARTICLE XXVII

Les Puissances Signataires considèrent comme un devoir, dans le cas où un conflit aigu menacerait d'éclater entre deux ou plusieurs d'entre elles, de rappeler à celles-ci que la Cour Permanente leur est ouverte.

En conséquence, elles déclarent que le fait de rappeler aux Parties en conflit les dispositions de la présente Convention, et le conseil donné, dans l'intérêt supérieur de la paix, de s'adresser à la Cour Permanente ne peuvent être considérés que comme actes de bons offices.

## ARTICLE XXVIII

Un Conseil Administratif Permanent composé des Représentants Diplomatiques des Puissances Signataires accrédités à La Haye et du Ministre des Affaires Étrangères des Pays-Bas qui remplira les fonctions de Président, sera constitué dans cette ville le plus tôt possible après la ratification du présent Acte par neuf Puissances au moins.

Ce Conseil sera chargé d'établir et d'organiser le Bureau International, lequel demeurera sous sa direction et sous son contrôle.

Il notifiera aux Puissances la constitution de la Cour et pourvoira à l'installation de celle-ci.

Il arrêtera son règlement d'ordre ainsi que tous autres règlements nécessaires.

Il décidera toutes les questions administratives qui pourraient surgir touchant le fonctionnement de la Cour.

Il aura tout pouvoir quant à la nomination, la suspension, ou la révocation des fonctionnaires et employés du Bureau.

Il fixera les traitements et salaires et contrôlera la dépense générale.

La présence de cinq membres dans les réunions dûment convoquées suffit pour permettre au Conseil de délibérer valablement. Les décisions sont prises à la majorité des voix.

Le Conseil communique sans délai aux Puissances Signataires les règlements adoptés par lui. Il leur adresse chaque année un Rapport sur les travaux de la Cour, sur le fonctionnement des services administratifs, et sur les dépenses.

#### ARTICLE XXIX

Les frais du Bureau seront supportés par les Puissances Signataires dans la proportion établie pour le Bureau International de l'Union Postale Universelle.

### Chapitre III.—*De la Procédure Arbitrale*

#### ARTICLE XXX

En vue de favoriser le développement de l'arbitrage, les Puissances Signataires ont arrêté les règles suivantes, qui seront applicables à la procédure arbitrale, en tant que les Parties ne sont pas convenues d'autres règles.

#### ARTICLE XXXI

Les Puissances qui recourent à l'arbitrage signent un Acte spécial (Compromis) dans lequel sont nettement déterminés l'objet du litige ainsi que l'étendue des pouvoirs des arbitres. Cet Acte implique l'engagement des Parties de se soumettre de bonne foi à la sentence arbitrale.

#### ARTICLE XXXII

Les fonctions arbitrales peuvent être conférées à un arbitre unique ou à plusieurs arbitres désignés par les Parties à leur gré, ou choisis par elles parmi les membres de la Cour Permanente d'Arbitrage établie par le présent Acte.

A défaut de constitution du Tribunal par l'accord immédiat des Parties, il est procédé de la manière suivante :

Chaque Partie nomme deux arbitres et ceux-ci choisissent ensemble un surarbitre.

En cas de partage des voix, le choix du surarbitre est confié à une Puissance tierce, désignée de commun accord par les Parties.

Si l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente, et le choix du surarbitre est fait de concert par les Puissances ainsi désignées.

#### ARTICLE XXXIII

Lorsqu'un Souverain ou un Chef d'État est choisi pour arbitre, la procédure arbitrale est réglée par lui.

#### ARTICLE XXXIV

Le surarbitre est de droit Président du Tribunal.

Lorsque le Tribunal ne comprend pas de surarbitre, il nomme lui-même son Président.

#### ARTICLE XXXV

En cas de décès, de démission, ou d'empêchement, pour quelque cause que ce soit, de l'un des arbitres, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

#### ARTICLE XXXVI

Le siège du Tribunal est désigné par les Parties. A défaut de cette désignation le Tribunal siège à La Haye.

Le siège ainsi fixé ne peut, sauf le cas de force majeure, être changé par le Tribunal que de l'assentiment des Parties.

#### ARTICLE XXXVII

Les Parties ont le droit de nommer auprès du Tribunal des délégués ou agents spéciaux, avec la mission de servir d'intermédiaires entre elles et le Tribunal.

Elles sont en outre autorisées à charger de la défense de leurs droits et intérêts devant le Tribunal, des Conseils ou avocats nommés par elles à cet effet.



## ARTICLE XXXVIII

Le Tribunal décide du choix des langues dont il fera usage et dont l'emploi sera autorisé devant lui.

## ARTICLE XXXIX

La procédure arbitrale comprend en règle générale deux phases distinctes : l'instruction et les débats.

L'instruction consiste dans la communication faite par les agents respectifs, aux membres du Tribunal et à la Partie adverse, de tous actes imprimés ou écrits et de tous documents contenant les moyens invoqués dans la cause. Cette communication aura lieu dans la forme et dans les délais déterminés par le Tribunal en vertu de l'Article XLIX.

Les débats consistent dans le développement oral des moyens des Parties devant le Tribunal.

## ARTICLE XL

Toute pièce produite par l'une des Parties doit être communiquée à l'autre Partie.

## ARTICLE XLI

Les débats sont dirigés par le Président.

Ils ne sont publics qu'en vertu d'une décision du Tribunal prise avec l'assentiment des Parties.

Ils sont consignés dans des procès-verbaux rédigés par des secrétaires que nomme le Président. Ces procès-verbaux ont seuls caractère authentique.

## ARTICLE XLII

L'instruction étant close, le Tribunal a le droit d'écarter du débat tous Actes ou documents nouveaux qu'une des Parties voudrait lui soumettre sans le consentement de l'autre.

## ARTICLE XLIII

Le Tribunal demeure libre de prendre en considération les Actes ou documents nouveaux sur lesquels les agents ou Conseils des Parties appelleraient son attention.

En ce cas, le Tribunal a le droit de requérir la production de ces Actes ou documents, sauf l'obligation d'en donner connaissance à la Partie adverse.

## ARTICLE XLIV

Le Tribunal peut, en outre, requérir des agents des Parties la production de tous Actes et demander toutes explications nécessaires. En cas de refus le Tribunal en prend acte.

## ARTICLE XLV

Les agents et les Conseils des Parties sont autorisés à présenter oralement au Tribunal tous les moyens qu'ils jugent utiles à la défense de leur cause.

## ARTICLE XLVI

Ils ont le droit de soulever des exceptions et incidents. Les décisions du Tribunal sur ces points sont définitives et ne peuvent donner lieu à aucune discussion ultérieure.

## ARTICLE XLVII

Les membres du Tribunal ont le droit de poser des questions aux agents et aux Conseils des Parties et de leur demander des éclaircissements sur les points douteux.

Ni les questions posées, ni les observations faites par les membres du Tribunal pendant le cours des débats ne peuvent être regardées comme l'expression des opinions du Tribunal en général ou de ses membres en particulier.

## ARTICLE XLVIII

Le Tribunal est autorisé à déterminer sa compétence en interprétant le Compromis ainsi que les autres Traités qui peuvent être invoqués dans la matière, et en appliquant les principes du droit international.

## ARTICLE XLIX

Le Tribunal a le droit de rendre des ordonnances de procédure pour la direction du procès, de déterminer les formes et délais dans lesquels chaque Partie devra prendre ses conclusions et de procéder à toutes les formalités que comporte l'administration des preuves.

## ARTICLE L

Les agents et les Conseils des Parties ayant présenté tous les éclaircissements et preuves à l'appui de leur cause, le Président prononce la clôture des débats.

## ARTICLE LI

Les délibérations du Tribunal ont lieu à huis-clos.

Toute décision est prise à la majorité des membres du Tribunal.

Le refus d'un membre de prendre part au vote doit être constaté dans le procès-verbal.

## ARTICLE LII

La sentence arbitrale, votée à la majorité des voix, est motivée. Elle est rédigée par écrit et signée par chacun des membres du Tribunal.

Ceux des membres qui sont restés en minorité peuvent constater, en signant, leur dissentiment.

## ARTICLE LIII

La sentence arbitrale est lue en séance publique du Tribunal, les agents et les Conseils des Parties présents ou dûment appelés.

## ARTICLE LIV

La sentence arbitrale, dûment prononcée et notifiée aux agents des Parties en litige, décide définitivement et sans appel la contestation.

## ARTICLE LV

Les Parties peuvent se réserver dans le Compromis de demander la revision de la sentence arbitrale.

Dans ce cas et sauf convention contraire, la demande doit être adressée au Tribunal qui a rendu la sentence. Elle ne peut être motivée que par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui, lors de la clôture des débats, était inconnu du Tribunal lui-même et de la Partie qui a demandé la revision.

La procédure de revision ne peut être ouverte que par une décision du Tribunal constatant expressément l'existence du fait nouveau, lui reconnaissant les caractères prévus par le paragraphe précédent et déclarant à ce titre la demande recevable.

Le Compromis détermine le délai dans lequel la demande de revision doit être formée.

## ARTICLE LVI

La sentence arbitrale n'est obligatoire que pour les Parties qui ont conclu le Compromis.

Lorsqu'il s'agit de l'interprétation d'une Convention à laquelle ont participé d'autres Puissances que les Parties en litige, celles-ci notifient aux premières les Compromis qu'elles ont conclu. Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre elles ont profité de cette faculté, l'interprétation contenue dans la sentence est également obligatoire à leur égard.

## ARTICLE LVII

Chaque Partie supporte ses propres frais et une part égale des frais du Tribunal.

*Dispositions Générales*

## ARTICLE LVIII

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances qui ont été représentées à la Conférence Internationale de la Paix de La Haye.

## ARTICLE LIX

Les Puissances non-Signataires qui ont été représentées à la Conférence Internationale de la Paix pourront adhérer à la présente Convention. Elles auront à cet effet à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

## ARTICLE LX

Les conditions auxquelles les Puissances qui n'ont pas été représentées à la Conférence Internationale de la Paix pourront adhérer à la présente Convention formeront l'objet d'une entente ultérieure entre les Puissances Contractantes.

## ARTICLE LXI

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Convention, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

## APPENDIX VI

### INTERNATIONAL CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND

*Signed at the Hague, July 29, 1899*

#### ARTICLE I

Les Hautes Parties Contractantes donneront à leurs forces armées de terre des instructions qui seront conformes au "Règlement concernant les Lois et Coutumes de la Guerre sur Terre," annexé à la présente Convention.

#### ARTICLE II

Les dispositions contenues dans le Règlement visé à l'Article I. ne sont obligatoires que pour les Puissances Contractantes en cas de guerre entre deux ou plusieurs d'entre elles.

Ces dispositions cesseront d'être obligatoires du moment où, dans une guerre entre des Puissances Contractantes, une Puissance non contractante se joindrait à 'un des belligérants.

#### ARTICLE III

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

#### ARTICLE IV

Les Puissances non-Signataires sont admises à adhérer à la présente Convention.

Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas, et communiquée par celui-ci à toutes les autres Puissances Contractantes.

#### ARTICLE V

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Convention, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas, et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi les Plénipotentiaires ont signé la présente Convention et l'ont revêtue de leurs cachets.

Fait à La Haye, le vingt-neuf Juillet, mil huit cent quatre-vingt-dix-neuf, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas, et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

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#### Annexe.

#### RÈGLEMENT CONCERNANT LES LOIS ET COUTUMES DE LA GUERRE SUR TERRE.

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#### SECTION I.—*Des Belligérants*

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##### Chapitre I.—*De la Qualité de Belligérant*

Article 1. Les lois, les droits, et les devoirs de la guerre ne s'appliquent pas seulement à l'armée, mais encore aux milices et aux corps de volontaires réunissant les conditions suivantes :—

1. D'avoir à leur tête une personne responsable pour ses subordonnés ;
2. D'avoir un signe distinctif, fixe, et reconnaissable à distance ;
3. De porter les armes ouvertement ; et
4. De se conformer dans leurs opérations aux lois et coutumes de la guerre.

Dans les pays où les milices ou des corps de volontaires constituent l'armée ou en font partie, ils sont compris sous la dénomination "d'armée."

Art. 2. La population d'un territoire non occupé qui, à l'approche de l'ennemi, prend spontanément les armes pour combattre les troupes d'invasion sans avoir eu le temps de s'organiser conformément à l'Article 1, sera considérée comme belligérante si elle respecte les lois et coutumes de la guerre.

Art. 3. Les forces armées des parties belligérantes peuvent se composer de combattants et de non-combattants. En cas de capture par l'ennemi, les uns et les autres ont droit au traitement des prisonniers de guerre.

### Chapitre II.—*Des Prisonniers de Guerre*

Art. 4. Les prisonniers de guerre sont au pouvoir du Gouvernement ennemi, mais non des individus ou des corps qui les ont capturés.

Ils doivent être traités avec humanité.

Tout ce qui leur appartient personnellement, excepté les armes, les chevaux, et les papiers militaires, reste leur propriété.

Art. 5. Les prisonniers de guerre peuvent être assujettis à l'internement dans une ville, forteresse, camp, ou localité quelconque, avec obligation de ne pas s'en éloigner au delà de certaines limites déterminées ; mais ils ne peuvent être enfermés que par mesure de sûreté indispensable.

Art. 6. L'État peut employer, comme travailleurs, les prisonniers de guerre, selon leur grade et leurs aptitudes. Ces travaux ne seront pas excessifs, et n'auront aucun rapport avec les opérations de la guerre.

Les prisonniers peuvent être autorisés à travailler pour le compte d'Administrations publiques ou de particuliers, ou pour leur propre compte.

Les travaux faits pour l'État sont payés d'après les tarifs en vigueur pour les militaires de l'armée nationale exécutant les mêmes travaux.

Lorsque les travaux ont lieu pour le compte d'autres Administrations publiques, ou pour des particuliers, les conditions en sont réglées d'accord avec l'autorité militaire.

Le salaire des prisonniers contribuera à adoucir leur position, et le surplus leur sera compté au moment de leur libération, sauf défalcation des frais d'entretien.

Art. 7. Le Gouvernement au pouvoir duquel se trouvent les prisonniers de guerre est chargé de leur entretien.



A défaut d'une entente spéciale entre les belligérants, les prisonniers de guerre seront traités, pour la nourriture, le couchage, et l'habillement, sur le même pied que les troupes du Gouvernement qui les aura capturés.

Art. 8. Les prisonniers de guerre seront soumis aux lois, règlements, et ordres en vigueur dans l'armée de l'État au pouvoir duquel ils se trouvent. Tout acte d'insubordination autorise, à leur égard, les mesures de rigueur nécessaires.

Les prisonniers évadés, qui seraient repris avant d'avoir pu rejoindre leur armée, ou avant de quitter le territoire occupé par l'armée qui les aura capturés, sont passibles de peines disciplinaires.

Les prisonniers qui, après avoir réussi à s'évader, sont de nouveau faits prisonniers, ne sont passibles d'aucune peine pour la fuite antérieure.

Art. 9. Chaque prisonnier de guerre est tenu de déclarer, s'il est interrogé à ce sujet, ses véritables noms et grade, et, dans le cas où il enfreindrait cette règle, il s'exposerait à une restriction des avantages accordés aux prisonniers de guerre de sa catégorie.

Art. 10. Les prisonniers de guerre peuvent être mis en liberté sur parole, si les lois de leur pays les y autorisent, et, en pareil cas, ils sont obligés, sous la garantie de leur honneur personnel, de remplir scrupuleusement, tant vis-à-vis de leur propre Gouvernement que vis-à-vis de celui qui les a faits prisonniers, les engagements qu'ils auraient contractés.

Dans le même cas, leur propre Gouvernement est tenu de n'exiger ni accepter d'eux aucun service contraire à la parole donnée.

Art. 11. Un prisonnier de guerre ne peut être contraint d'accepter sa liberté sur parole; de même le Gouvernement ennemi n'est pas obligé d'accéder à la demande du prisonnier réclamant sa mise en liberté sur parole.

Art. 12. Tout prisonnier de guerre, libéré sur parole, et repris portant les armes contre le Gouvernement envers lequel il s'était engagé d'honneur, ou contre les alliés de celui-ci, perd le droit au traitement des prisonniers de guerre, et peut être traduit devant les Tribunaux.

Art. 13. Les individus qui suivent une armée sans en faire directement partie, tels que les correspondants et les reporters de journaux, les vivandiers, les fournisseurs, qui tombent au pouvoir de l'ennemi, et que celui-ci juge utile de détenir, ont droit au traitement des prisonniers de guerre, à condition qu'ils

soient munis d'une légitimation de l'autorité militaire de l'armée qu'ils accompagnaient.

Art. 14. Il est constitué, dès le début des hostilités, dans chacun des États belligérants, et le cas échéant, dans les pays neutres qui auront recueilli des belligérants sur leur territoire, un bureau de renseignements sur les prisonniers de guerre. Ce bureau, chargé de répondre à toutes les demandes qui les concernent, reçoit des divers services compétents toutes les indications nécessaires pour lui permettre d'établir une fiche individuelle pour chaque prisonnier de guerre. Il est tenu au courant des internements et des mutations, ainsi que des entrées dans les hôpitaux et des décès.

Le bureau de renseignements est également chargé de recueillir et de centraliser tous les objets d'un usage personnel, valeurs, lettres, &c., qui seront trouvés sur les champs de bataille ou délaissés par des prisonniers décédés dans les hôpitaux et ambulances, et de les transmettre aux intéressés.

Art. 15. Les Sociétés de Secours pour les prisonniers de guerre, régulièrement constituées selon la loi de leur pays, et ayant pour objet d'être les intermédiaires de l'action charitable, recevront, de la part des belligérants, pour elles et pour leurs agents dûment accrédités, toute facilité, dans les limites tracées par les nécessités militaires et les règles administratives, pour accomplir efficacement leur tâche d'humanité. Les délégués de ces Sociétés pourront être admis à distribuer des secours dans les dépôts d'internement, ainsi qu'aux lieux d'étape des prisonniers rapatriés, moyennant une permission personnelle délivrée par l'autorité militaire, et en prenant l'engagement par écrit de se soumettre à toutes les mesures d'ordre et de police que celle-ci prescrirait.

Art. 16. Les bureaux de renseignements jouissent de la franchise de port. Les lettres, mandats, et articles d'argent, ainsi que les colis postaux destinés aux prisonniers de guerre ou expédiés par eux, seront affranchis de toutes taxes postales, aussi bien dans les pays d'origine et de destination que dans les pays intermédiaires.

Les dons et secours en nature destinés aux prisonniers de guerre seront admis en franchise de tous droits d'entrée et autres, ainsi que des taxes de transport sur les chemins de fer exploités par l'État.

Art. 17. Les officiers prisonniers pourront recevoir le complément, s'il y a lieu, de la solde qui leur est attribuée dans cette

situation par les règlements de leur pays, à charge de remboursement par leur Gouvernement.

Art. 18. Toute latitude est laissée aux prisonniers de guerre pour l'exercice de leur religion, y compris l'assistance aux offices de leur culte, à la seule condition de se conformer aux mesures d'ordre et de police prescrites par l'autorité militaire.

Art. 19. Les testaments de prisonniers de guerre sont reçus ou dressés dans les mêmes conditions que pour les militaires de l'armée nationale.

On suivra également les mêmes règles en ce qui concerne les pièces relatives à la constatation des décès, ainsi que pour l'inhumation des prisonniers de guerre, en tenant compte de leur grade et de leur rang.

Art. 20. Après la conclusion de la paix, le rapatriement des prisonniers de guerre s'effectuera dans le plus bref délai possible.

### Chapitre III.—*Des Malades et des Blessés*

Art. 21. Les obligations des belligérants concernant le service des malades et des blessés sont régies par la Convention de Genève du 22 Août, 1864, sauf les modifications dont celle-ci pourra être l'objet.

## SECTION II.—*Des Hostilités*

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### Chapitre I.—*Des Moyens de Nuire à l'Ennemi, des Sièges, et des Bombardements*

Art. 22. Les belligérants n'ont pas un droit illimité quant au choix des moyens de nuire à l'ennemi.

Art. 23. Outre les prohibitions établies par des Conventions spéciales, il est notamment interdit—

- (a.) D'employer du poison ou des armes empoisonnées ;
- (b.) De tuer ou de blesser par trahison des individus appartenant à la nation ou à l'armée ennemie ;
- (c.) De tuer ou de blesser un ennemi qui, ayant mis bas les armes, ou n'ayant plus les moyens de se défendre, s'est rendu à discrétion ;
- (d.) De déclarer qu'il ne sera pas fait de quartier ;
- (e.) D'employer des armes, des projectiles, ou des matières propres à causer des maux superflus ;

(f.) D'user indûment du pavillon parlementaire, du pavillon national, ou des insignes militaires et de l'uniforme de l'ennemi, ainsi que des signes distinctifs de la Convention de Genève;

(g.) De détruire ou de saisir des propriétés ennemis, sauf les cas où ces destructions ou ces saisies seraient impérieusement commandées par les nécessités de la guerre.

Art. 24. Les ruses de guerre et l'emploi de moyens nécessaires pour se procurer des renseignements sur l'ennemi et sur le terrain sont considérés comme *licites*.

Art. 25. Il est interdit d'attaquer ou de bombarder des villes, villages, habitations, ou bâtiments qui ne sont pas défendus.

Art. 26. Le Commandant des troupes assaillantes, avant d'entreprendre le bombardement, et sauf le cas d'attaque de vive force, devra faire tout ce qui dépend de lui pour en avertir les autorités.

Art. 27. Dans les sièges et bombardements, toutes les mesures nécessaires doivent être prises pour épargner, autant que possible, les édifices consacrés aux cultes, aux arts, aux sciences, et à la bienfaisance, les hôpitaux, et les lieux de rassemblement de malades et de blessés, à condition qu'ils ne soient pas employés en même temps à un but militaire.

Le devoir des assiégés est de désigner ces édifices au lieu de rassemblement par des signes visibles spéciaux qui seront notifiés d'avance à l'assiégeant.

Art. 28. Il est interdit de livrer au pillage même une ville ou localité prise d'assaut.

## Chapitre II.—*Des Espions*

Art. 29. Ne peut être considéré comme espion que l'individu qui, agissant clandestinement, ou sous de faux prétextes, recueille, ou cherche à recueillir, des informations dans la zone d'opérations d'un belligérant, avec l'intention de les communiquer à la partie adverse.

Ainsi les militaires non déguisés qui ont pénétré dans la zone d'opérations de l'armée ennemie, à l'effet de recueillir des informations, ne sont pas considérés comme espions. De même, ne sont pas considérés comme espions : les militaires et les non-militaires, accomplissant ouvertement leur mission, chargés de transmettre des dépêches destinées soit à leur propre armée, soit à l'armée ennemie. A cette catégorie appartiennent également les individus envoyés en ballon pour transmettre les dépêches, et, en général, pour entretenir les communications entre les diverses parties d'une armée ou d'un territoire.

Art. 30. L'espion pris sur le fait ne pourra être puni sans jugement préalable.

Art. 31. L'espion qui, ayant rejoint l'armée à laquelle il appartient, est capturé plus tard par l'ennemi, est traité comme prisonnier de guerre, et n'encourt aucune responsabilité pour ses actes d'espionnage antérieurs.

### Chapitre III.—*Des Parlementaires*

Art. 32. Est considéré comme parlementaire l'individu autorisé par l'un des belligérants à entrer en pourparlers avec l'autre et se présentant avec le drapeau blanc. Il a droit à l'inviolabilité, ainsi que le trompette, clarion, ou tambour, le porte-drapeau, et l'interprète qui l'accompagneraient.

Art. 33. Le Chef auquel un parlementaire est expédié n'est pas obligé de le recevoir en toutes circonstances.

Il peut prendre toutes les mesures nécessaires afin d'empêcher le parlementaire de profiter de sa mission pour se renseigner.

Il a le droit, en cas d'abus, de retenir temporairement le parlementaire.

Art. 34. Le parlementaire perd ses droits d'inviolabilité s'il est prouvé, d'une manière positive et irrécusable, qu'il a profité de sa position privilégiée pour provoquer ou commettre un acte de trahison.

### Chapitre IV.—*Des Capitulations*

Art. 35. Les Capitulations arrêtées entre les Parties Contractantes doivent tenir compte des règles de l'honneur militaire.

Une fois fixées, elles doivent être scrupuleusement observées par les deux parties.

### Chapitre V.—*De l'Armistice*

Art. 36. L'armistice suspend les opérations de guerre par un accord mutuel des parties belligérantes. Si la durée n'en est pas déterminée, les parties belligérantes peuvent reprendre en tout temps les opérations, pourvu toutefois que l'ennemi soit averti en temps convenu, conformément aux conditions de l'armistice.

Art. 37. L'armistice peut être général ou local. Le premier suspend partout les opérations de guerre des Etats belligérants ;

le second, seulement entre certaines fractions des armées belligérantes et dans un rayon déterminé.

Art. 38. L'armistice doit être notifié officiellement et en temps utile aux autorités compétentes et aux troupes. Les hostilités sont suspendues immédiatement après la notification ou au terme fixé.

Art. 39. Il dépend des Parties Contractantes de fixer, dans les clauses de l'armistice, les rapports qui pourraient avoir lieu, sur le théâtre de la guerre, avec les populations et entre elles.

Art. 40. Toute violation grave de l'armistice, par l'une des Parties, donne à l'autre le droit de le dénoncer, et même, en cas d'urgence, de reprendre immédiatement les hostilités.

Art. 41. La violation des clauses de l'armistice, par des particuliers agissant de leur propre initiative, donne droit seulement à réclamer la punition des coupables, et s'il y a lieu, une indemnité pour les pertes éprouvées.

### SECTION III.—*De l'Autorité Militaire sur le Territoire de l'État Ennemi*

Art. 42. Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.

L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

Art. 43. L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publiques, en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.

Art. 44. Il est interdit de forcer la population d'un territoire occupé à prendre part aux opérations militaires contre son propre pays.

Art. 45. Il est interdit de contraindre la population d'un territoire occupé à prêter serment à la Puissance ennemie.

Art. 46. L'honneur et les droits de la famille, la vie des individus, et la propriété privée, ainsi que les convictions religieuses et l'exercice des cultes, doivent être respectés.

La propriété privée ne peut pas être confisquée.

Art. 47. Le pillage est formellement interdit.

Art. 48. Si l'occupant prélève, dans le territoire occupé, les impôts, droits et péages établis au profit de l'État, il le fera, autant que possible, d'après les règles de l'assiette et de la répartition en vigueur, et il en résultera pour lui l'obligation de pour-

voir aux frais de l'administration du territoire occupé dans la mesure où le Gouvernement légal y était tenu.

Art. 49. Si, en dehors des impôts visés à l'Article précédent, l'occupant prélève d'autres contributions en argent dans le territoire occupé, ce ne pourra être que pour les besoins de l'armée ou de l'administration de ce territoire.

Art. 50. Aucune peine collective, pécuniaire, ou autre, ne pourra être édictée contre les populations à raison de faits individuels dont elles ne pourraient être considérées comme solidairement responsables.

Art. 51. Aucune contribution ne sera perçue qu'en vertu d'un ordre écrit et sous la responsabilité d'un Général-en-chef.

Il ne sera procédé, autant que possible, à cette perception que d'après les règles de l'assiette et de la répartition des impôts en vigueur.

Pour toute contribution un reçu sera délivré aux contribuables.

Art. 52. Des réquisitions en nature et des services ne pourront être réclamés des communes ou des habitants que pour les besoins de l'armée d'occupation. Ils seront en rapport avec les ressources du pays et de telle nature qu'ils n'impliquent pas pour les populations l'obligation de prendre part aux opérations de la guerre contre leur patrie.

Ces réquisitions et ces services ne seront réclamés qu'avec l'autorisation du Commandant dans la localité occupée.

Les prestations en nature seront, autant que possible, payées au comptant ; sinon, elles seront constatées par des reçus.

Art. 53. L'armée qui occupe un territoire ne pourra saisir que le numéraire, les fonds, et les valeurs exigibles appartenant en propre à l'État, les dépôts d'armes, moyen de transport, magasins et approvisionnements, et, en général, toute propriété mobilière de l'État de nature à servir aux opérations de la guerre.

Le matériel de chemins de fer, les télégraphes de terre, les téléphones, les bateaux à vapeur et autres navires, en dehors des cas régis par la loi maritime, de même que les dépôts d'armes, et en général toute espèce de munitions de guerre, même appartenant à des Sociétés ou à des personnes privées, sont également des moyens de nature à servir aux opérations de la guerre, mais devront être restitués, et les indemnités seront réglées à la paix.

Art. 54. Le matériel des chemins de fer provenant d'Etats neutres, qu'il appartienne à ces États ou à des Sociétés ou personnes privées, leur sera renvoyé aussitôt que possible.

Art. 55. L'État occupant ne se considérera que comme administrateur et usufruitier des édifices publics, immeubles, forêts, et exploitations agricoles appartenant à l'État ennemi et se trouvant dans le pays occupé. Il devra sauvegarder le fond de ces propriétés et les administrer conformément aux règles de l'usufruit.

Art. 56. Les biens de communes, ceux des établissements consacrés aux cultes, à la charité, et à l'instruction, aux arts et aux sciences, même appartenant à l'État, seront traités comme la propriété privée.

Toute saisie, destruction, ou dégradation intentionnelle de semblables établissements, de monuments historiques, d'œuvres d'art et de science, est interdite, et doit être poursuivie.

#### SECTION IV.—*Des Belligérants internés et des Blessés soignés chez les Neutres*

Art. 57. L'État neutre qui reçoit sur son territoire des troupes appartenant aux armées belligérantes, les internera, autant que possible, loin du théâtre de la guerre.

Il pourra les garder dans des camps, et même les enfermer dans des forteresses ou dans des lieux appropriés à cet effet.

Il décidera si les officiers peuvent être laissés libres en prenant l'engagement sur parole de ne pas quitter le territoire neutre sans autorisation.

Art. 58. A défaut de Convention spéciale, l'État neutre fournira aux internés les vivres, les habillements, et les secours commandés par l'humanité.

Bonification sera faite, à la paix, des frais occasionnés par l'internement.

Art. 59. L'État neutre pourra autoriser le passage sur son territoire des blessés ou malades appartenant aux armées belligérantes, sous la réserve que les trains qui les amèneront ne transporteront ni personnel ni matériel de guerre. En pareil cas, l'État neutre est tenu de prendre les mesures de sûreté et de contrôle nécessaires à cet effet.

Les blessés ou malades amenés dans ces conditions sur le territoire neutre par un des belligérants, et qui appartiendraient à la partie adverse, devront être gardés par l'État neutre, de manière qu'ils ne puissent de nouveau prendre part aux opérations de la guerre. Celui-ci aura les mêmes devoirs quant aux blessés ou malades de l'autre armée qui lui seraient confiés.

Art. 60. La Convention de Genève s'applique aux malades et aux blessés internés sur territoire neutre.



## APPENDIX VII

### INTERNATIONAL CONVENTION FOR THE ADAP- TATION TO MARITIME WARFARE OF THE PRIN- CIPLES OF THE GENEVA CONVENTION OF AUGUST 22, 1864

*Signed at the Hague, July 29, 1899*

#### ARTICLE I

Les bâtiments-hôpitaux militaires, c'est-à-dire les bâtiments construits ou aménagés par les Etats spécialement et uniquement en vue de porter secours aux blessés, malades, et naufragés, et dont les noms auront été communiqués, à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage, aux Puissances belligérantes, sont respectés et ne peuvent être capturés pendant la durée des hostilités.

Ces bâtiments ne sont pas non plus assimilés aux navires de guerre au point de vue de leur séjour dans un port neutre.

#### ARTICLE II

Les bâtiments-hospitaliers, équipés en totalité ou en partie aux frais des particuliers ou des Sociétés de Secours officiellement reconnues, sont également respectés et exempts de capture, si la Puissance belligérante dont ils dépendent leur a donné une commission officielle et en a notifié les noms à la Puissance adverse à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage.

Ces navires doivent être porteurs d'un document de l'autorité compétente déclarant qu'ils ont été soumis à son contrôle pendant leur armement et à leur départ final.

#### ARTICLE III

Les bâtiments-hospitaliers, équipés en totalité ou en partie aux frais des particuliers ou des Sociétés officiellement reconnues

de pays neutres, sont respectés et exempts de capture, si la Puissance neutre dont ils dépendent leur a donné une commission officielle et en a notifié les noms aux Puissances belligérantes à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage.

#### ARTICLE IV

Les bâtiments qui sont mentionnés dans les Articles I, II, et III, porteront secours et assistance aux blessés, malades, et naufragés des belligérants sans distinction de nationalité.

Les Gouvernements s'engagent à n'utiliser ces bâtiments pour aucun but militaire.

Ces bâtiments ne devront gêner en aucune manière les mouvements des combattants.

Pendant et après le combat, ils agiront à leurs risques et périls.

Les belligérants auront sur eux le droit de contrôle et de visite; ils pourront refuser leur concours, leur enjoindre de s'éloigner, leur imposer une direction déterminée, et mettre à bord un commissaire, même les détenir, si la gravité des circonstances l'exigeait.

Autant que possible, les belligérants inscriront sur le journal de bord des bâtiments-hospitaliers les ordres qu'ils leur donneront.

#### ARTICLE V

Les bâtiments-hôpitaux militaires seront distingués par une peinture extérieure blanche avec une bande horizontale verte d'un mètre et demi de largeur environ.

Les bâtiments qui sont mentionnés dans les Articles II et III seront distingués par une peinture extérieure blanche avec une bande horizontale rouge d'un mètre et demi de largeur environ.

Les embarcations des bâtiments qui viennent d'être mentionnés, comme les petits bâtiments qui pourront être affectés au service hospitalier, se distingueront par une peinture analogue.

Tous les bâtiments-hospitaliers se feront reconnaître en hissant, avec leur pavillon national, le pavillon blanc à croix rouge prévu par la Convention de Genève.

#### ARTICLE VI

Les bâtiments de commerce, yachts, ou embarcations neutres, portant ou recueillant des blessés, des malades, ou des naufragés

des belligérants, ne peuvent être capturés pour le fait de ce transport, mais ils restent exposés à la capture pour les violations de neutralité qu'ils pourraient avoir commises.

#### ARTICLE VII

Le personnel religieux, médical, et hospitalier de tout bâtiment capturé est inviolable et ne peut être fait prisonnier de guerre. Il emporte, en quittant le navire, les objets et les instruments de chirurgie qui sont sa propriété particulière.

Ce personnel continuera à remplir ses fonctions tant que cela sera nécessaire et il pourra ensuite se retirer lorsque le Commandant-en-chef le jugera possible.

Les belligérants doivent assurer à ce personnel tombé entre leurs mains la jouissance intégrale de son traitement.

#### ARTICLE VIII

Les marins et les militaires embarqués blessés ou malades, à quelque nation qu'ils appartiennent, seront protégés et soignés par les capteurs.

#### ARTICLE IX

Sont prisonniers de guerre les naufragés, blessés, ou malades d'un belligérant qui tombent au pouvoir de l'autre. Il appartient à celui-ci de décider, suivant les circonstances, s'il convient de les garder, de les diriger sur un port de sa nation, sur un port neutre, ou même sur un port de l'adversaire. Dans ce dernier cas, les prisonniers ainsi rendus à leur pays ne pourront servir pendant la durée de la guerre.

#### ARTICLE X

(Exclu.) \*

#### ARTICLE XI

Les règles contenues dans les Articles ci-dessus ne sont obligatoires que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

\* The text of this Article was as follows [Ed.] :—

"Les naufragés, blessés ou malades, qui sont débarqués dans un port neutre, du consentement de l'autorité locale, devront, à moins d'un arrangement contraire de l'État neutre avec les États belligérants, être gardés par l'État neutre de manière qu'ils ne puissent pas de nouveau prendre part aux opérations de la guerre."

Les dites règles cesseront d'être obligatoires du moment où, dans une guerre entre des Puissances Contractantes, une Puissance non-contractante se joindrait à l'un des belligérants.

#### ARTICLE XII

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

#### ARTICLE XIII

Les Puissances non-signataires, qui auront accepté la Convention de Genève du 22 Août, 1864, sont admises à adhérer à la présente Convention.

Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

#### ARTICLE XIV

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Convention, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi les Plénipotentiaires ont signé la présente Convention, et l'ont revêtue de leur cachets.

Fait à La Haye, le vingt-neuf Juillet, mil huit cent quatre-vingt-dix-neuf, en un seul exemplaire qui restera déposé dans les archives du Gouvernement des Pays-Bas, et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

## APPENDIX VIII

### DECLARATION CONCERNING EXPANDING (DUM-DUM) BULLETS

*Signed at the Hague, July 29, 1899*

LES Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à la Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Petersbourg du 29 Novembre (11 Décembre), 1868,

Déclarent :

Les Puissances Contractantes s'interdisent l'emploi de balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain, telles que les balles à enveloppe dure dont l'enveloppe ne couvrirait pas entièrement le noyau ou serait pourvue d'incisions.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes, une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à La Haye, le 29 Juillet, 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

## APPENDIX IX

### DECLARATION CONCERNING THE LAUNCHING OF PROJECTILES FROM BALLOONS

*Signed at the Hague, July 29, 1899*

LES Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à la Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Pétersbourg du 29 Novembre (11 Décembre), 1868,

Déclarent :

Les Puissances Contractantes consentent, pour une durée de cinq ans, à l'interdiction de lancer des projectiles et des explosifs du haut de ballons ou par d'autres modes analogues nouveaux.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes, une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes

dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à La Haye, le 29 Juillet, 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.



## APPENDIX X

### DECLARATION CONCERNING THE DIFFUSION OF ASPHYXIATING GASES

*Signed at the Hague, July 29, 1899*

LES Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à la Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Pétersbourg du 29 Novembre (11 Décembre), 1868,

Déclarent :

Les Puissances Contractantes s'interdisent l'emploi de projectiles qui ont pour but unique de répandre des gaz asphyxiants ou délétères.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à la Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes

dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à la Haye, le 29 Juillet, 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

## APPENDIX XI

### THE NAVAL PRIZE ACT, 1864

27 & 28 VICT., CHAPTER 25

An Act for regulating Naval Prize of War.

[23d. June 1864.]

WHEREAS it is expedient to enact permanently, with Amendments, such Provisions concerning Naval Prize, and Matters connected therewith, as have heretofore been usually passed at the Beginning of a War :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

#### *Preliminary*

1. This Act may be cited as The Naval Prize Act, 1864.

2. In this Act—

The Term "the Lords of the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the Office of Lord High Admiral :

The Term "the High Court of Admiralty" means the High Court of Admiralty of *England* :

The Term "any of Her Majesty's Ships of War" includes any of Her Majesty's Vessels of War, and any hired armed Ship or Vessel in Her Majesty's Service :

The Term "Officers and Crew" includes Flag Officers, Commanders, and other Officers, Engineers, Seamen, Marines, Soldiers, and others on board any of Her Majesty's Ships of War :

The Term "Ship" includes Vessel and Boat, with the Tackle, Furniture, and Apparel of the Ship, Vessel, or Boat :

Short  
Title.  
Interpre-  
tation of  
Terms.

The Term "Ship Papers" includes all Books, Passes, Sea Briefs, Charter Parties, Bills of Lading, Cockets, Letters, and other Documents and Writings delivered up or found on board a captured Ship :

The Term "Goods" includes all such Things as are by the Course of Admiralty and Law of Nations the Subject of Adjudication as Prize (other than Ships).

### I.—PRIZE COURTS

3. The High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other Court exercising Admiralty Jurisdiction in Her Majesty's Dominions, for the Time being authorized to take cognizance of and judicially proceed in Matters of Prize, shall be a Prize Court within the Meaning of this Act.

High Court of Admiralty and other Courts to be Prize Courts for Purposes of Act.

Every such Court, other than the High Court of Admiralty, is comprised in the Term "Vice-Admiralty Prize Court," when hereafter used in this Act.

#### *High Court of Admiralty*

4. The High Court of Admiralty shall have Jurisdiction throughout Her Majesty's Dominions as a Prize Court.

Jurisdiction of High Court of Admiralty.

The High Court of Admiralty as a Prize Court shall have Power to enforce any Order or Decree of a Vice-Admiralty Prize Court, and any Order or Decree of the Judicial Committee of the Privy Council in a Prize Appeal.

#### *Appeal ; Judicial Committee*

5. An Appeal shall lie to Her Majesty in Council from any Order or Decree of a Prize Court, as of Right in case of a Final Decree, and in other Cases with the Leave of the Court making the Order or Decree.

Appeal to Queen in Council, in what Cases.

Every Appeal shall be made in such Manner and Form and subject to such Regulations (including Regulations as to Fees, Costs, Charges, and Expenses) as may for the Time being be directed by Order in Council, and in the Absence of any such Order, or so far as any such Order does not extend, then in such Manner and Form and subject to such Regulations as are for the Time being prescribed or in force respecting Maritime Causes of Appeal.

Jurisdiction of Judicial Committee in Prize Appeals.

6. The Judicial Committee of the Privy Council shall have Jurisdiction to hear and report on any such Appeal, and may therein exercise all such Powers as for the Time being appertain to them in respect of Appeals from any Court of Admiralty Jurisdiction, and all such Powers as are under this Act vested in the High Court of Admiralty, and all such Powers as were wont to be exercised by the Commissioners of Appeal in Prize Causes.

Custody of Processes, Papers, &c.  
Limit of Time for Appeal.

7. All Processes and Documents required for the Purposes of any such Appeal shall be transmitted to and shall remain in the Custody of the Registrar of Her Majesty in Prize Appeals.

8. In every such Appeal the usual Inhibition shall be extracted from the Registry of Her Majesty in Prize Appeals within Three Months after the Date of the Order or Decree appealed from if the Appeal be from the High Court of Admiralty, and within Six Months after that Date if it be from a Vice-Admiralty Prize Court.

The Judicial Committee may, nevertheless, on sufficient Cause shown, allow the Inhibition to be extracted and the Appeal to be prosecuted after the Expiration of the respective Periods aforesaid.

#### *Vice-Admiralty Prize Courts*

Enforcement of Orders of High Court, &c.

9. Every Vice-Admiralty Prize Court shall enforce within its Jurisdiction all Orders and Decrees of the Judicial Committee in Prize Appeals and of the High Court of Admiralty in Prize Causes.

Salaries of Judges of Vice-Admiralty Prize Courts.

10. Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court a Salary not exceeding Five hundred Pounds a Year, payable out of Money provided by Parliament, subject to such Regulations as seem meet.

A Judge to whom a Salary is so granted shall not be entitled to any further Emolument, arising from Fees or otherwise, in respect of Prize Business transacted in his Court.

An Account of all such Fees shall be kept by the Registrar of the Court, and the Amount thereof shall be carried to and form Part of the Consolidated Fund of the United Kingdom.

Retiring Pensions of Judges, as in 22 & 23 Vict. c. 26.

11. In accordance, as far as Circumstances admit, with the Principles and Regulations laid down in The Superannuation Act, 1859, Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court an annual or other Allowance, to take effect on the Termination of his Service, and to be payable out of Money provided by Parliament.

12. The Registrar of every Vice-Admiralty Prize Court shall, on the First Day of *January* and First Day of *July* in every Year, make out a Return (in such Form as the Lords of the Admiralty from Time to Time direct) of all Cases adjudged in the Court since the last half-yearly Return, and shall with all convenient Speed send the same to the Registrar of the High Court of Admiralty, who shall keep the same in the Registry of that Court, and who shall, as soon as conveniently may be, send a Copy of the Returns of each Half Year to the Lords of the Admiralty, who shall lay the same before both Houses of Parliament.

Returns  
from Vice-  
Admiralty  
Prize  
Courts.

#### *General*

13. The Judicial Committee of the Privy Council, with the Judge of the High Court of Admiralty, may from Time to Time frame General Orders for regulating (subject to the Provisions of this Act) the Procedure and Practice of Prize Courts, and the Duties and Conduct of the Officers thereof and of the Practitioners therein, and for regulating the Fees to be taken by the Officers of the Courts, and the Costs, Charges, and Expenses to be allowed to the Practitioners therein.

General  
Orders for  
Prize  
Courts.

Any such General Orders shall have full Effect, if and when approved by Her Majesty in Council, but not sooner or otherwise.

Every Order in Council made under this Section shall be laid before both Houses of Parliament.

Every such Order in Council shall be kept exhibited in a conspicuous Place in each Court to which it relates.

14. It shall not be lawful for any Registrar, Marshal, or other Officer of any Prize Court, or for the Registrar of Her Majesty in Prize Appeals, directly or indirectly to act or be in any Manner concerned as Advocate, Proctor, Solicitor, or Agent, or otherwise, in any Prize Cause or Appeal, on pain of Dismissal or Suspension from Office, by Order of the Court or of the Judicial Committee (as the Case may require).

Prohibition of  
Officer of  
Prize  
Court  
acting as  
Proctor,  
&c.

15. It shall not be lawful for any Proctor or Solicitor, or Person practising as a Proctor or Solicitor, being employed by a Party in a Prize Cause or Appeal, to be employed or concerned, by himself or his Partner, or by any other Person, directly or indirectly, by or on behalf of any adverse Party in that Cause or Appeal, on pain of Exclusion or Suspension from Practice in Prize Matters, by Order of the Court or of the Judicial Committee (as the Case may require).

Prohibition of  
Proctors  
being concerned for  
adverse  
Parties in  
a Cause.

## II.—PROCEDURE IN PRIZE CAUSES

*Proceedings by Captors*

Custody  
of Prize  
Ship.

16. Every Ship taken as Prize, and brought into Port within the Jurisdiction of a Prize Court, shall forthwith, and without Bulk broken, be delivered up to the Marshal of the Court.

If there is no such Marshal, then the Ship shall be in like Manner delivered up to the principal Officer of Customs at the Port.

The Ship shall remain in the Custody of the Marshal, or of such Officer, subject to the Orders of the Court.

Bringing  
in of Ship  
Papers.

17. The Captors shall, with all practicable Speed after the Ship is brought into Port, bring the Ship Papers into the Registry of the Court.

The Officer in Command, or One of the Chief Officers of the capturing Ship, or some other Person who was present at the Capture, and saw the Ship Papers delivered up or found on board, shall make Oath that they are brought in as they were taken, without Fraud, Addition, Subduction, or Alteration, or else shall account on Oath to the Satisfaction of the Court for the Absence or altered Condition of the Ship Papers or any of them.

Where no Ship Papers are delivered up or found on board the captured Ship, the Officer in Command, or One of the Chief Officers of the capturing Ship, or some other Person who was present at the Capture, shall make Oath to that Effect.

Issue of  
Monition.

18. As soon as the Affidavit as to Ship Papers is filed, a Monition shall issue, returnable within Twenty Days from the Service thereof, citing all Persons in general to show Cause why the captured Ship should not be condemned.

Examina-  
tions on  
Standing  
Inter-  
rogatories.

19. The Captors shall, with all practicable Speed after the captured Ship is brought into Port, bring Three or Four of the principal Persons belonging to the captured Ship before the Judge of the Court or some Person authorized in this Behalf, by whom they shall be examined on Oath on the Standing Interrogatories.

The Preparatory Examinations on the Standing Interrogatories shall, if possible, be concluded within Five Days from the Commencement thereof.

Adjudica-  
tion by  
Court.

20. After the Return of the Monition, the Court shall, on Production of the Preparatory Examinations and Ship Papers, proceed with all convenient Speed either to condemn or to release the captured Ship.

21. Where, on Production of the Preparatory Examinations and Ship Papers, it appears to the Court doubtful whether the captured Ship is good Prize or not, the Court may direct further Proof to be adduced, either by Affidavit or by Examination of Witnesses, with or without Pleadings, or by Production of further Documents; and on such further Proof being adduced the Court shall with all convenient Speed proceed to Adjudication.

Further  
Proof.

22. The foregoing Provisions, as far as they relate to the Custody of the Ship, and to Examination on the Standing Interrogatories, shall not apply to Ships of War taken as Prize.

Custody,  
&c. of  
Ships of  
War.

### *Claim*

23. At any Time before Final Decree made in the Cause, any Person claiming an Interest in the Ship may enter in the Registry of the Court a Claim, verified on Oath.

Entry of  
Claim;  
Security  
for Costs.

Within Five Days after entering the Claim, the Claimant shall give Security for Costs in the Sum of Sixty Pounds; but the Court shall have Power to enlarge the Time for giving Security, or to direct Security to be given in a larger Sum, if the Circumstances appear to require it.

### *Appraisement*

24. The Court may, if it thinks fit, at any Time direct that the captured Ship be appraised.

Power to  
Court to  
direct  
Appraise-  
ment.

Every Appraisement shall be made by competent Persons sworn to make the same according to the best of their Skill and Knowledge.

### *Delivery on Bail*

25. After Appraisement, the Court may, if it thinks fit, direct that the captured Ship be delivered up to the Claimant, on his giving Security to the Satisfaction of the Court to pay to the Captors the appraised Value thereof in case of Condemnation.

Power to  
Court to  
direct  
Delivery  
to Claim-  
ant on  
Bail.

### *Sale*

26. The Court may at any Time, if it thinks fit, on account of the Condition of the captured Ship, or on the Application of a Claimant, order that the captured Ship be appraised as aforesaid (if not already appraised), and be sold.

Power to  
Court to  
order  
Sale.

27. On or after Condemnation the Court may, if it thinks fit, order that the Ship be appraised as aforesaid (if not already appraised), and be sold.

Sale on  
Condem-  
nation.



How Sales  
to be  
made.

28. Every Sale shall be made by or under the Superintendence of the Marshal of the Court or of the Officer having the Custody of the captured Ship.

Payment  
of Pro-  
ceeds to  
Paymaster  
General or  
Official  
Account-  
tant.

29. The Proceeds of any Sale, made either before or after Condemnation, and after Condemnation the appraised Value of the captured Ship, in case she has been delivered up to a Claimant on Bail, shall be paid under an Order of the Court either into the Bank of *England* to the Credit of Her Majesty's Paymaster General, or into the Hands of an Official Accountant (belonging to the Commissariat or some other Department) appointed for this Purpose by the Commissioners of Her Majesty's Treasury or by the Lords of the Admiralty, subject in either Case to such Regulations as may from Time to Time be made, by order in Council, as to the Custody and Disposal of Money so paid.

#### *Small armed Ships*

One Adju-  
dication  
as to  
several  
small  
Ships.

30. The Captors may include in One Adjudication any Number, not exceeding Six, of armed Ships not exceeding One hundred Tons each, taken within Three Months next before Institution of Proceedings.

#### *Goods*

Applica-  
tion of  
foregoing  
Provisions  
to Prize  
Goods.

31. The foregoing Provisions relating to Ships shall extend and apply, *mutatis mutandis*, to Goods taken as Prize on board Ship; and the Court may direct such Goods to be unladen, inventoried, and warehoused.

#### *Monition to Captors to proceed*

Power to  
Court to  
call on  
Captors to  
proceed to  
Adjudica-  
tion.

32. If the Captors fail to institute or to prosecute with Effect Proceedings for Adjudication, a Monition shall, on the Application of a Claimant, issue against the Captors, returnable within Six Days from the Service thereof, citing them to appear and proceed to Adjudication; and on the Return thereof the Court shall either forthwith proceed to Adjudication or direct further Proof to be adduced as aforesaid and then proceed to Adjudication.

#### *Claim on Appeal*

Person in-  
tervening  
on Appeal  
to enter  
Claim.

33. Where any Person, not an original Party in the Cause, intervenes on Appeal, he shall enter a Claim, verified on Oath, and shall give Security for Costs.

## III.—SPECIAL CASES OF CAPTURE

*Land Expeditions*

34. Where, in an Expedition of any of Her Majesty's Naval or Naval and Military Forces against a Fortress or Possession on Land, Goods belonging to the State of the Enemy or to a Public Trading Company of the Enemy exercising Powers of Government are taken in the Fortress or Possession, or a Ship is taken in Waters defended by or belonging to the Fortress or Possession, a Prize Court shall have Jurisdiction as to the Goods or Ship so taken, and any Goods taken on board the Ship, as in case of Prize.

Jurisdiction of Prize Court in case of Capture in Land Expedition.

*Conjunct Capture with Ally*

35. Where any Ship or Goods is or are taken by any of Her Majesty's Naval or Naval and Military Forces while acting in conjunction with any Forces of any of Her Majesty's Allies, a Prize Court shall have Jurisdiction as to the same as in case of Prize, and shall have Power, after Condemnation, to apportion the due Share of the Proceeds to Her Majesty's Ally, the proportionate Amount and the Disposition of which Share shall be such as may from Time to Time be agreed between Her Majesty and Her Majesty's Ally.

Jurisdiction of Prize Court in case of Expedition with Ally.

*Joint Capture*

36. Before Condemnation, a Petition on behalf of asserted joint Captors shall not (except by special Leave of the Court) be admitted, unless and until they give Security to the Satisfaction of the Court to contribute to the actual Captors a just Proportion of any Costs, Charges, or Expenses or Damages that may be incurred by or awarded against the actual Captors on account of the Capture and Detention of the Prize.

Restriction on Petitions by asserted joint Captors.

After Condemnation, such a Petition shall not (except by special Leave of the Court) be admitted unless and until the asserted joint Captors pay to the actual Captors a just Proportion of the Costs, Charges, and Expenses incurred by the actual Captors in the Case, and give such Security as aforesaid, and show sufficient Cause to the Court why their Petition was not presented before Condemnation.

Provided, that nothing in the present Section shall extend to the asserted Interest of a Flag Officer claiming to share by virtue of his Flag.

*Offences against Law of Prize*

In case of  
Offence by  
Captors,  
Prize to be  
reserved  
for Crown.

37. A Prize Court, on Proof of any Offence against the Law of Nations, or against this Act, or any Act relating to Naval Discipline, or against any Order in Council or Royal Proclamation, or of any Breach of Her Majesty's Instructions relating to Prize, or of any Act of Disobedience to the Orders of the Lords of the Admiralty, or to the Command of a Superior Officer, committed by the Captors in relation to any Ship or Goods taken as Prize, or in relation to any Person on board any such Ship, may, on Condemnation, reserve the Prize to Her Majesty's Disposal, notwithstanding any Grant that may have been made by Her Majesty in favour of Captors.

*Pre-emption*

Purchase  
by Ad-  
miralty  
for Public  
Service of  
Stores on  
board  
Foreign  
Ships.

38. Where a Ship of a Foreign Nation passing the Seas laden with Naval or Victualling Stores intended to be carried to a Port of any Enemy of Her Majesty is taken and brought into a Port of the United Kingdom, and the Purchase for the Service of Her Majesty of the Stores on board the Ship appears to the Lords of the Admiralty expedient without the Condemnation thereof in a Prize Court, in that Case the Lords of the Admiralty may purchase, on the Account or for the Service of Her Majesty, all or any of the Stores on board the Ship; and the Commissioners of Customs may permit the Stores purchased to be entered and landed within any Port.

*Capture by Ship other than a Ship of War*

Prizes  
taken by  
Ships  
other than  
Ships of  
War to  
be Droits  
of Ad-  
miralty.

39. Any Ship or Goods taken as Prize by any of the Officers and Crew of a Ship other than a Ship of War of Her Majesty shall, on Condemnation, belong to Her Majesty in Her Office of Admiralty.

## IV.—PRIZE SALVAGE

Salvage to  
Re-cap-  
tors of  
British  
Ship or  
Goods  
from  
Enemy.

40. Where any Ship or Goods belonging to any of Her Majesty's Subjects, after being taken as Prize by the Enemy, is or are retaken from the Enemy by any of Her Majesty's Ships of War, the same shall be restored by Decree of a Prize Court to the Owner, on his paying as Prize Salvage One Eighth Part of the Value of the Prize to be decreed and ascertained by the Court, or such Sum not exceeding One Eighth Part of the estimated Value of the Prize as may be agreed on between the

Owner and the Re-captors, and approved by Order of the Court; Provided, that where the Re-capture is made under Circumstances of special Difficulty or Danger, the Prize Court may, if it thinks fit, award to the Re-captors as Prize Salvage a larger Part than One Eighth Part, but not exceeding in any Case One Fourth Part, of the Value of the Prize.

Provided also, that where a Ship after being so taken is set forth or used by any of Her Majesty's Enemies as a Ship of War, this Provision for Restitution shall not apply, and the Ship shall be adjudicated on as in other Cases of Prize.

41. Where a Ship belonging to any of Her Majesty's Subjects, after being taken as Prize by the Enemy, is retaken from the Enemy by any of Her Majesty's Ships of War, she may, with the Consent of the Re-captors, prosecute her Voyage, and it shall not be necessary for the Re-captors to proceed to Adjudication till her Return to a Port of the United Kingdom.

Permis-  
sion to re-  
captured  
Ship to  
proceed  
on  
Voyage.

The Master or Owner, or his Agent, may, with the Consent of the Re-captors, unload and dispose of the Goods on board the Ship before Adjudication.

In case the Ship does not, within Six Months, return to a Port of the United Kingdom, the Re-captors may nevertheless institute Proceedings against the Ship or Goods in the High Court of Admiralty, and the Court may thereupon award Prize Salvage as aforesaid to the Re-captors, and may enforce Payment thereof, either by Warrant of Arrest against the Ship or Goods, or by Monition and Attachment against the Owner.

#### V.—PRIZE BOUNTY

42. If, in relation to any War, Her Majesty is pleased to declare, by Proclamation or Order in Council, Her Intention to grant Prize Bounty to the Officers and Crews of Her Ships of War, then such of the Officers and Crew of any of Her Majesty's Ships of War as are actually present at the taking or destroying of any armed Ship of any of Her Majesty's Enemies shall be entitled to have distributed among them as Prize Bounty a Sum calculated at the Rate of Five Pounds for each Person on board the Enemy's Ship at the Beginning of the Engagement.

Prize  
Bounty to  
Officers  
and Crew  
present at  
Engage-  
ment with  
an Enemy.

Ascertainment of Amount of Prize Bounty by Decree of Prize Court.

43. The Number of the Persons so on board the Enemy's Ship shall be proved in a Prize Court, either by the Examinations on Oath of the Survivors of them, or of any Three or more of the Survivors, or if there is no Survivor by the Papers of the Enemy's Ship, or by the Examinations on Oath of Three or more of the Officers and Crew of Her Majesty's Ship, or by such other Evidence as may seem to the Court sufficient in the Circumstances.

The Court shall make a Decree declaring the Title of the Officers and Crew of Her Majesty's Ship to the Prize Bounty, and stating the Amount thereof.

The Decree shall be subject to Appeal as other Decrees of the Court.

Payment of Prize Bounty awarded.

44. On Production of an official Copy of the Decree the Commissioners of Her Majesty's Treasury shall, out of Money provided by Parliament, pay the Amount of Prize Bounty decreed, in such Manner as any Order in Council may from Time to Time direct.

#### VI.—MISCELLANEOUS PROVISIONS

##### *Ransom*

Power for regulating Ransom by Order in Council.

45. Her Majesty in Council may from Time to Time, in relation to any War, make such Orders as may seem expedient, according to Circumstances, for prohibiting or allowing, wholly or in certain Cases, or subject to any Conditions or Regulations or otherwise, as may from Time to Time seem meet, the ransoming or the entering into any Contract or Agreement for the ransoming of any Ship or Goods belonging to any of Her Majesty's Subjects, and taken as Prize by any of Her Majesty's Enemies.

Any Contract or Agreement entered into, and any Bill, Bond, or other Security given for Ransom of any Ship or Goods, shall be under the exclusive Jurisdiction of the High Court of Admiralty as a Prize Court (subject to Appeal to the Judicial Committee of the Privy Council), and if entered into or given in contravention of any such Order in Council shall be deemed to have been entered into or given for an illegal Consideration.

If any Person ransoms or enters into any Contract or Agreement for ransoming any Ship or Goods, in contravention of any such Order in Council, he shall for every such Offence be liable to be proceeded against in the High Court of Admiralty at the Suit of Her Majesty in Her Office of Admiralty, and on Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds.

*Convoy*

46. If the Master or other Person having the Command of any Ship of any of Her Majesty's Subjects, under the Convoy of any of Her Majesty's Ships of War, wilfully disobeys any lawful Signal, Instruction, or Command of the Commander of the Convoy, or without Leave deserts the Convoy, he shall be liable to be proceeded against in the High Court of Admiralty at the Suit of Her Majesty in Her Office of Admiralty, and upon Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds, and to suffer Imprisonment for such Time, not exceeding One Year, as the Court may adjudge.

Punishment of Masters of Merchant Vessels under Convoy disobeying Orders or deserting Convoy.

*Customs Duties and Regulations.*

47. All Ships and Goods taken as Prize and brought into a Port of the United Kingdom shall be liable to and be charged with the same Rates and Charges and Duties of Customs as under any Act relating to the Customs may be chargeable on other Ships and Goods of the like Description ; and

Prize Ships and Goods liable to Duties and Forfeiture.

All Goods brought in as Prize which would on the voluntary Importation thereof be liable to Forfeiture or subject to any Restriction under the Laws relating to the Customs, shall be deemed to be so liable and subject, unless the Commissioners of Customs see fit to authorize the Sale or Delivery thereof for Home Use or Exportation, unconditionally or subject to such Conditions and Regulations as they may direct.

48. Where any Ship or Goods taken as Prize is or are brought into a Port of the United Kingdom, the Master or other Person in charge or command of the Ship which has been taken or in which the Goods are brought shall, on Arrival at such Port, bring to at the proper Place of Discharge, and shall, when required by any Officer of Customs, deliver an Account in Writing under his Hand concerning such Ship and Goods, giving such Particulars relating thereto as may be in his Power, and shall truly answer all Questions concerning such Ship or Goods asked by any such Officer, and in default shall forfeit a Sum not exceeding One hundred Pounds, such Forfeiture to be enforced as Forfeitures for Offences against the Laws relating to the Customs are enforced, and every such Ship shall be liable to such Searches as other Ships are liable to, and the Officers of the Customs may freely go on board such Ship and bring to the Queen's Warehouse any Goods on board the same, subject, nevertheless, to such Regulations in respect of Ships of

Regulations of Customs to be observed as to Prize Ships and Goods.

War belonging to Her Majesty as shall from Time to Time be issued by the Commissioners of Her Majesty's Treasury.

Power for  
Treasury  
to remit  
Customs  
Duties in  
certain  
Cases.

49. Goods taken as Prize may be sold either for Home Consumption or for Exportation; and if in the former Case the Proceeds thereof, after Payment of Duties of Customs, are insufficient to satisfy the just and reasonable Claims thereon, the Commissioners of Her Majesty's Treasury may remit the whole or such Part of the said Duties as they see fit.

### *Perjury*

Punish-  
ment of  
Persons  
guilty of  
Perjury.

50. If any Person wilfully and corruptly swears, declares, or affirms falsely in any Prize Cause or Appeal, or in any Proceeding under this Act, or in respect of any Matter required by this Act to be verified on Oath, or suborns any other Person to do so, he shall be deemed guilty of Perjury, or of Subornation of Perjury (as the Case may be), and shall be liable to be punished accordingly.

### *Limitation of Actions, &c.*

Actions  
against  
Persons  
executing  
Act not to  
be brought  
without  
Notice, &c.

51. Any Action or Proceeding shall not lie in any Part of Her Majesty's Dominions against any Person acting under the Authority or in the Execution or intended Execution or in pursuance of this Act for any alleged Irregularity or Trespass, or other Act or Thing done or omitted by him under this Act, unless Notice in Writing (specifying the Cause of the Action or Proceeding) is given by the intending Plaintiff or Prosecutor to the intended Defendant One Month at least before the Commencement of the Action or Proceeding, nor unless the Action or Proceeding is commenced within Six Months next after the Act or Thing complained of is done or omitted, or, in case of a Continuation of Damage, within Six Months next after the doing of such Damage has ceased.

In any such Action the Defendant may plead generally that the Act or Thing complained of was done or omitted by him when acting under the Authority or in the Execution or intended Execution or in pursuance of this Act, and may give all special Matter in Evidence; and the Plaintiff shall not succeed if Tender of sufficient Amends is made by the Defendant before the Commencement of the Action; and in case no Tender has been made, the Defendant may, by Leave of the Court in which the Action is brought, at any Time pay into Court such Sum of Money as he thinks fit, whereupon such Proceeding and Order shall be had and made in and by the Court as may be had and

made on the Payment of Money into Court in an ordinary Action; and if the Plaintiff does not succeed in the Action, the Defendant shall receive such full and reasonable Indemnity as to all Costs, Charges, and Expenses incurred in and about the Action as may be taxed and allowed by the proper Officer, subject to Review; and though a Verdict is given for the Plaintiff in the Action he shall not have Costs against the Defendant, unless the Judge before whom the Trial is had certifies his Approval of the Action.

Any such Action or Proceeding against any Person in Her Majesty's Naval Service, or in the Employment of the Lords of the Admiralty, shall not be brought or instituted elsewhere than in the United Kingdom.

### *Petitions of Right*

52. A Petition of Right, under The Petitions of Right Act, 1860, may, if the Suppliant thinks fit, be intituled in the High Court of Admiralty, in case the Subject Matter of the Petition or any material Part thereof arises out of the Exercise of any Belligerent Right on behalf of the Crown, or would be cognizable in a Prize Court within Her Majesty's Dominions if the same were a Matter in dispute between private Persons.

Any Petition of Right under the last-mentioned Act, whether intituled in the High Court of Admiralty or not, may be prosecuted in that Court, if the Lord Chancellor thinks fit so to direct.

The Provisions of this Act relative to Appeal, and to the framing and Approval of General Orders for regulating the Procedure and Practice of the High Court of Admiralty, shall extend to the Case of any such Petition of Right intituled or directed to be prosecuted in that Court; and, subject thereto, all the Provisions of The Petitions of Right Act, 1860, shall apply, *mutatis mutandis*, in the Case of any such Petition of Right; and for the Purposes of the present Section the Terms "Court" and "Judge" in that Act shall respectively be understood to include and to mean the High Court of Admiralty and the Judge thereof, and other Terms shall have the respective Meanings given to them in that Act.

Jurisdiction of High Court of Admiralty on Petitions of Right in certain Cases, as in 23 & 24 Vict. c. 34.

### *Orders in Council*

53. Her Majesty in Council may from Time to Time make such Orders in Council as seem meet for the better Execution of this Act.

Power to make Orders in Council.



Order in  
Council  
to be  
gazetted,  
&c.

**54.** Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within Thirty Days after the making thereof, if Parliament is then sitting, and, if not, then within Thirty Days after the next Meeting of Parliament.

### *Savings*

Not to  
affect  
Rights of  
Crown ;  
Effect of  
Treaties,  
&c.

**55.** Nothing in this Act shall—

- (1.) give to the Officers and Crew of any of Her Majesty's Ships of War any Right or Claim in or to any Ship or Goods taken as Prize or the Proceeds thereof, it being the Intent of this Act that such Officers and Crews shall continue to take only such Interest (if any) in the Proceeds of Prizes as may be from Time to Time granted to them by the Crown ; or
- (2.) affect the Operation of any existing Treaty or Convention with any Foreign Power ; or
- (3.) take away or abridge the Power of the Crown to enter into any Treaty or Convention with any Foreign Power containing any Stipulation that may seem meet concerning any Matter to which this Act relates ; or
- (4.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any Right, Power, or Prerogative of Her Majesty the Queen in right of Her Crown, or in right of Her Office of Admiralty, or any Right or Power of the Lord High Admiral of the United Kingdom, or of the Commissioners for executing the Office of Lord High Admiral ; or
- (5.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the Jurisdiction or Authority of a Prize Court to take cognizance of and judicially proceed upon any Capture, Seizure, Prize, or Reprisal of any Ship or Goods, or to hear and determine the same, and, according to the Course of Admiralty and the Law of Nations, to adjudge and condemn any Ship or Goods, or any other Jurisdiction or Authority of or exerciseable by a Prize Court.

### *Commencement*

Com-  
mence-  
ment of  
Act.

**56.** This Act shall commence on the Commencement of The Naval Agency and Distribution Act, 1864.

## APPENDIX XII

### THE PRIZE COURTS ACT, 1894

57 & 58 VICT., CHAPTER 39

An Act to make further provision for the establishment of Prize Courts, and for other purposes connected therewith.

[17th August 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Prize Courts Act, 1894.

2.—(1.) Any commission, warrant, or instructions from Her Majesty the Queen or the Admiralty for the purpose of commissioning or regulating the procedure of a prize court at any place in a British possession may, notwithstanding the existence of peace, be issued at any time, with a direction that the court shall act only upon such proclamation as herein-after mentioned being made in the possession.

Short  
Title.

Constitu-  
tion of  
Prize  
Courts in  
British  
Posses-  
sions.

(2.) Where any such commission, warrant, or instructions have been issued, then, subject to instructions from Her Majesty, the Vice-Admiral of such possession may, when satisfied, by information from a Secretary of State or otherwise, that war has broken out between Her Majesty and any foreign State, proclaim that war has so broken out, and thereupon the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war and such foreign State were named therein.

(3.) The said commission and warrant may authorise either a Vice-Admiralty Court or a Colonial Court of Admiralty, within the meaning of the Colonial Courts of Admiralty Act, 1890, to act as a prize court, and may establish a Vice-Admiralty Court for that purpose.

53 & 54  
Vict. c. 27.

(4.) Any such commission, warrant, or instructions may be revoked or altered from time to time.

(5.) A court duly authorised to act as a prize court during any war shall after the conclusion of the war continue so to act in relation to, and finally dispose of, all matters and things which arose during the war, including all penalties and forfeitures incurred during the war.

Rules of  
Court for  
and Fees  
in Prize  
Courts.  
27 & 28  
Vict. c. 25.

3.—(1.) Her Majesty the Queen in Council may make rules of court for regulating, subject to the provisions of the Naval Prize Act, 1864, and this Act, the procedure and practice of prize courts within the meaning of that Act, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

(2.) Every rule so made shall, whenever made, take effect at the time therein mentioned, and shall be laid before both Houses of Parliament, and shall be kept exhibited in a conspicuous place in each court to which it relates.

27 & 28  
Vict. c. 25.

(3.) This section shall be substituted for section thirteen of the Naval Prize Act, 1864, which section is hereby repealed.

53 & 54  
Vict. c. 27.

(4.) If any Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, is authorised under this Act or otherwise to act as a prize court, all fees arising in respect of prize business transacted in the court shall be fixed, collected, and applied in like manner as the fees arising in respect of the Admiralty business of the court under the said Act.

As to  
Vice-Ad-  
miralty  
Courts.

4. Her Majesty the Queen in Council may make rules of court for regulating the procedure and practice, including fees and costs, in a Vice-Admiralty Court, whether under this Act or otherwise.

Repeal of  
39 & 40  
Geo. 3,  
c. 79, s. 25.

5. Section twenty-five of the Government of India Act, 1800, is hereby repealed.

# GENERAL INDEX

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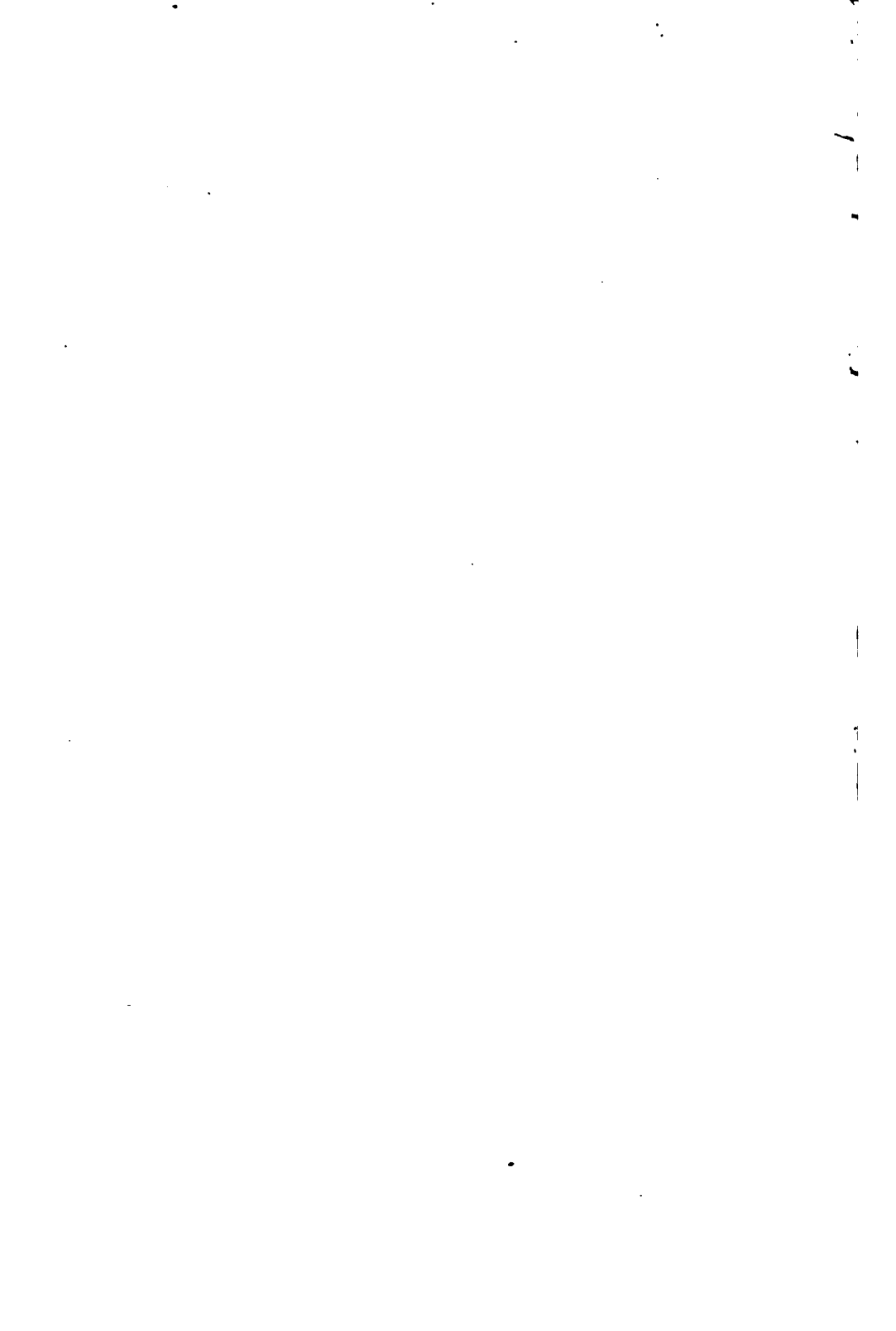


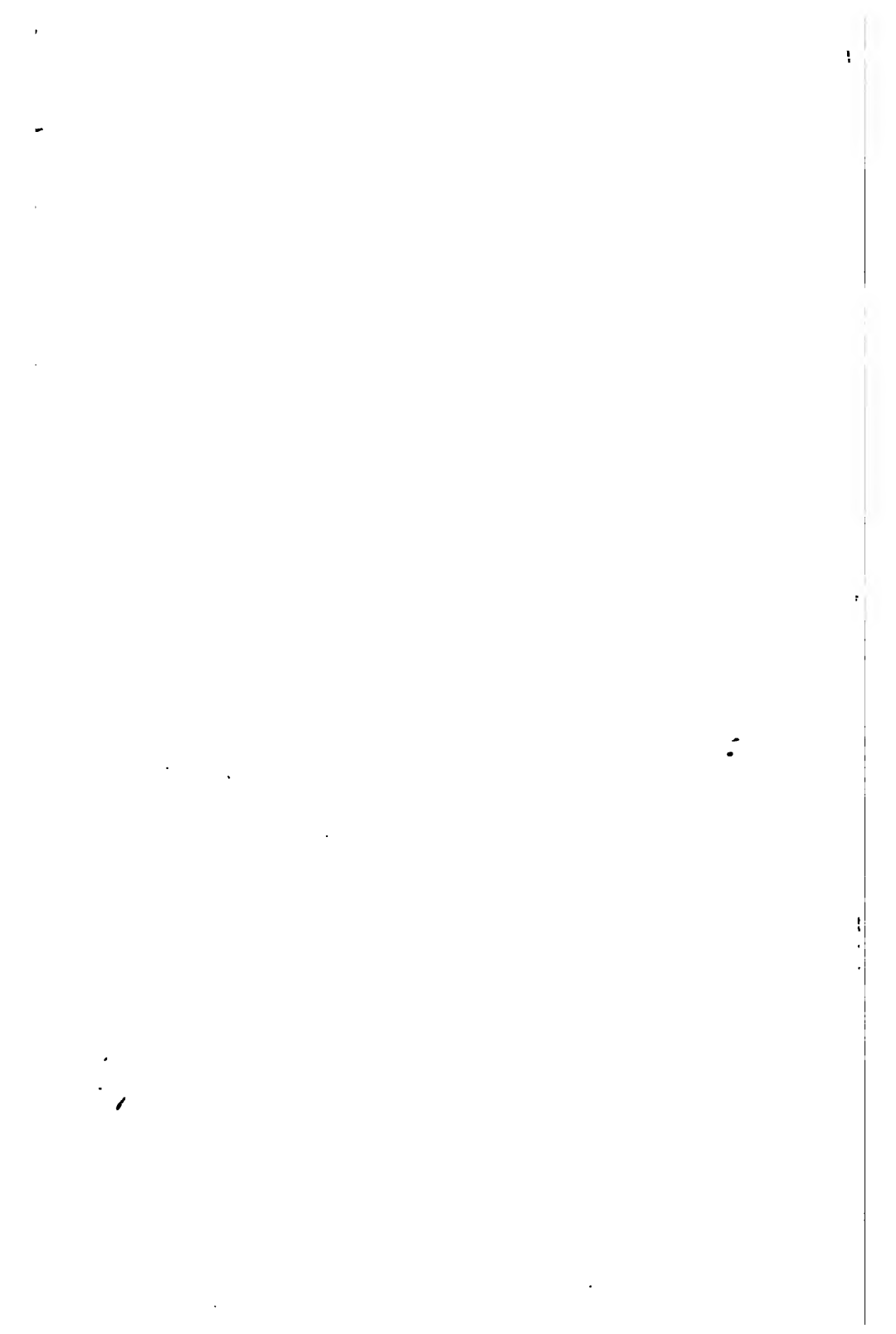
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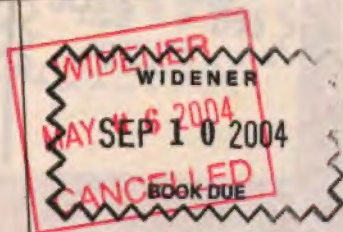
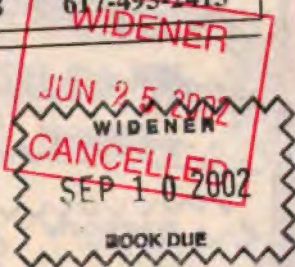
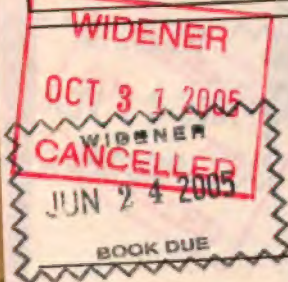
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